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Book Review

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LAW'S EMPIRE By Ronald Dworkin. Harvard University Press 1986.

I. INTRODUCTION

Its noble calling notwithstanding, the history of jurisprudence may be likened to the familiar childhood game, "King of the Mountain." The objective for the participants is to dethrone the prevailing doctrine or "ruling theory" of legal philosophy, so that one's own theory may ascend to its place as the rightful ruler of law's empire. The line of successful aspirants began with Plato and his doctrine of the philosopher king,[1] meandered through the natural law and social contract theorists of the Enlightenment,[2] and continued into modern times with Blackstone[3] and his ambitious utilitarian usurper, Bentham.[4] Bentham's utilitarian heirs—Austin,[5] Holmes,[6]

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1. *See* PLATO, *The Republic*, in THE COLLECTED DIALOGUES OF PLATO (E. Hamilton & H. Cairn eds. 1961).

2. *See, e.g.*, J. ROUSSEAU, THE SOCIAL CONTRACT (B. Radice & R. Baldick eds. 1968); T. HOBBES, LEVIATHAN (Clarendon Press 1965); J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett ed. 1964); MONTESQUIEU, THE SPIRIT OF THE LAWS (T. Nugent trans. 1949).

3. W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769 (Univ. Chicago Press 1979). For a recent discussion of this work, see Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209 (1979).

4. *See* J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds. 1970). For a brief historical account of Bentham's lifelong and ultimately successful effort to overturn Blackstone's model of judges as living, backward-looking oracles of ancient societal customs, see R. POSNER, THE ECONOMICS OF JUSTICE 13-47 (1981).

5. *See* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832). It is noteworthy that Hobbes, in his unfinished *A Dialogue Between a Philosopher and a Student of the Common Laws of England* (1681), developed a "command" theory of law that anticipated many features of Austin's analytical jurisprudence. In his *Dialogue*, Hobbes attacked the common-law system of precedents, which was then much admired by Bacon and Lord Coke, and argued instead that law is the bare declaration of a sovereign authority, with no logically necessary connection to either reason or custom.

6. *See* Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). Legal realists, such as Holmes and Pound, thought that the proper, unobscured understanding of the social phenomenon of law requires a sociological or historical approach that looks behind jurisprudential arguments and puzzles. The proper questions of this study focus on the way in which judges are influenced by class consciousness and economic circumstance. Dworkin argues that this view

> asks for social realism, but the kind of theory it recommends is unable to provide it. Of course, law is a social phenomenon. But its complexity, function, and consequence all depend on one special feature of its structure. Legal prac-

and, more recently, Hart[7]—have each acceded to the throne of Anglo-American jurisprudence by successively brandishing increasingly refined accounts of legal realism and positivism.

As the ruling theory, positivism distinguished sharply between the descriptive or positive aspect of law and its moral legitimacy: what law *is* is a wholly empirical matter, determined by discovering what the legal institutions of society, in particular the legislature and the courts, say it is. Further, whether the coercive enforcement of a law is politically legitimate depends solely upon whether the formal, institutional rulemaking procedures recognized by a society for propounding law have been followed in that particular case. If so, positivism allows the state to legitimately coerce its citizens to comply with even a morally unjust law. Thus, moral and political legitimacy are divorced: what the law can require is not in any principled way constrained or determined by the necessity of recognizing certain moral, political, or legal rights of individual citizens as a condition precedent to the legitimate political coercion of those citizens.[8]

Since what the law *ought* to be is left entirely to considerations of utilitarian policy, rights are accordingly reduced to political instrumentalities that protect individuals only insofar as doing so maximizes the benefits that inure to society. For Bentham and his followers, the notion of natural rights—political claims fundamen-

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tice, unlike many other social phenomena, is *argumentative*. Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions. People who have law make and debate claims about what law permits or forbids that would be impossible—because senseless—without law and a good part of what their law reveals about them cannot be discovered except by noticing how they ground and defend these claims. . . . [Study of law from] the internal point of view of those who make [legal] claims . . . is practical, in exactly the way the present objection ridicules. They do not want predictions of the legal claims they will make but arguments about which of these claims is sound and why; they want theories not about how history and economics have shaped their consciousness but about the place of these disciplines in argument about what the law requires . . . .

[T]he historian cannot understand law as a[n argumentative] social practice, even enough to reject it as deceptive, until he has a participant's understanding, until he has his own sense of what counts as a good or bad argument within that practice . . . . Theories that ignore . . . the internal character of legal argument [offer] explanations [that] are impoverished and defective, like innumerate histories of mathematics, whether they are written in the language of Hegel or Skinner.

R. DWORKIN, LAW'S EMPIRE 13-14 (1986) [hereinafter LAW'S EMPIRE].

7. *See* H. HART, THE CONCEPT OF LAW (1961).

8. *See id.* at 181-82.

tally independent of or even counterpoised to the welfare of society and valid even if they do not find expression in society's laws—was regarded as "nonsense on stilts."[9] Moreover, the considered utilitarian policies that would be adopted by an enlightened, broadly democratic society would find their clearest expression in the collective pronouncements of that society's political institutions—particularly the legislatures. Hence, Bentham and his followers believed judicial determination of what the law is to be a matter of empirically *discovering* what legal imperatives had been institutionally "posited" and this enterprise was to be carried out in a normatively neutral, detached fashion. Thus, what the law ought to be according to the shared moral values of the political community has no logical bearing on what the law is. Of course, judges could invoke common-law precedents and common-law principles of equity and construction; and they could search the text of a statute for its plain meaning or, if that was unavailing, they could attempt to divine legislative intent. But, according to the positivist model, adjudication did not and properly could not rely on constructive interpretations of the law that engaged a judge's moral and political value judgments or convictions. That enterprise was properly relegated to the legislature and subject to popular political constraints.

This ruling positivist-utilitarian coalition was firmly entrenched on the summit of Anglo-American jurisprudence when Ronald Dworkin launched his assault on it a decade ago in *Taking Rights Seriously*.[10] Since then, Dworkin has with subsequent essays[11] continued his ascent, permanently changing the landscape of issues on the way and making the necessary inroads to lay the groundwork for a new liberal jurisprudence.

In *Law's Empire* Dworkin makes his final assault on the summit, dislodging legal positivism and two related theories of adjudication, conventionalism and pragmatism. In their place, he develops a rich and sophisticated theory of jurisprudence. He begins by addressing what he takes to be the crucial question that any adequate theory of jurisprudence must answer: In hard cases, how do judges actually decide what the law is, and how should they decide what the law is?

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9. J. BENTHAM, ANARCHICAL FALLACIES, BEING AN EXAMINATION OF THE DECLARATION OF RIGHTS ISSUED DURING THE FRENCH REVOLUTION (1791).

10. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

11. Most of these have been collected in R. DWORKIN, A MATTER OF PRINCIPLE (1985). Dworkin's theory of interpretation in *A Matter of Principle* is critically reviewed from the perspective of contemporary literary theory in Lane, *The Poetics of Legal Interpretation*, 87 COLUM. L. REV. 197 (1987).

Thus, the theory has a positive aspect that takes seriously adjudicative disagreement and attempts to provide the best explanation of what judges say and actually do in deciding hard cases. More importantly, the theory is pervasively normative as well. Judges are not free to make law or to invent rights.[12] Instead, they must interpret what the law is by applying conflicting precedents in a manner that makes the entire body of our law the best it can be. Unlike conventionalism or pragmatism, this normative enterprise engages judges in both a constrained and constructive interpretation and application of those legal principles that have guided the development of black letter law in particular areas of dispute. The determination and application of these interpretively reconstructed legal principles are constrained exclusively neither by the demand that courts protect those societal expectations engendered by a conventional reading of the law, nor by a pragmatic concern to promote social welfare without the appearance of judicial activism. Instead, the principle of choice for the legitimate adjudication of hard cases will generally be the one that best promotes the political virtue of integrity—the virtue of treating citizens of the community equally under the law. This sense of integrity requires the community to treat its past political decisions as commitments to principles for guiding its present decisions. Indeed, if in adjudicating hard cases judges do not take the same care to preserve integrity as they do the other political virtues of justice, fairness, and procedural due process, the subsequent coercion of citizens pursuant to those decisions will fail the acid test of political legitimacy.

II. THEORETICAL DISAGREEMENT AND THE SEMANTIC STING

Dworkin begins *Law's Empire* by dismissing two current disputes that he contends are misguided and impede the development of a substantive theory about the nature of law. The first of these is a practical political debate about whether judges should be activists or, alternatively, should exercise restraint. Dworkin rejects this characterization of legal disagreement within (and outside) the courts because it mistakenly assumes that those judges deemed to

12. The historical antecedents of Dworkin's view can be traced at least to Bacon's claim that "[j]udges ought to remember that their office is *jus dicere*, and not *jus dare*, to interpret law, and not to make law, or give law." F. BACON, ESSAYS: OF JUDICATURE (1625). *But cf.* Austin, *Statute and Judiciary Law*, in 2 LECTURES ON JURISPRUDENCE 620 (R. Campbell ed. 1885) (noting that judges employ the fiction that common law is not made by them but merely declared from time to time); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 124 (1921) (observing that the power to declare law carries with it the power to make law when none exists).

be activists knowingly ignore the law and put in its place their own convictions about justice, rights, or policy. Dworkin insists that reducing judicial disagreement to an issue of "fidelity to law" obscures the real, more profitable debate about what the law that governs hard cases actually is. Dworkin convincingly supports his contention by examining the majority and dissenting opinions found in some classic hard cases.[13] The language and reasoning of these decisions seem to suggest that all of the authors believed that they had correctly interpreted the law at issue and that the dissenting judges were mistaken as to what the law actually required. Even if Dworkin is guilty of underestimating the number of judges who sometimes rule with fingers crossed, the general force of his claim is hard to deny without discarding the interpretive "principle of charity"[14] in favor of a pervasive legal cynicism.[15]

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13. Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889); Brown v. Board of Educ., 347 U.S. 483 (1954); TVA v. Hill, 437 U.S. 153 (1978); McLoughlin v. O'Brian [1983] A.C. 410, *reversing* [1981] Q.B. 599.

14. The interpretive principle of charity is

> [t]he maxim of translation . . . that assertions start[l]ingly [sic] false on the face of them are likely to turn on hidden differences of language . . . . The common sense behind the maxim is that one's interlocutor's silliness, beyond a certain point, is less likely than bad translation—or, in the domestic case, linguistic divergence.

W. QUINE, WORD AND OBJECT 59 (1960). *See also* Wilson, *Substances Without Substrata*, 12 REV. METAPHYSICS 521-39 (1959) (We select as designatum that individual which will make the largest possible number of statements true.). The principle, as applied to the normative or evaluative aspect of legal and political theory, might be stated thus: select that interpretation of the enterprise (*i.e.*, the precedents taken collectively, as the historical summation of the exercise of political power) which will cohere or fit with individual cases in a way that *commends* to us the largest possible number of cases.

15. *See* Hutchinson, *Indiana Dworkin and Law's Empire*, 96 YALE L.J. 637 (1987) [hereinafter *Indiana Dworkin*]. Hutchinson aligns himself with the Critical Legal Studies movement, and has argued that the law of accidents illustrates the indeterminacy of rules and principles in the law. The indeterminacy thesis holds that the existence of a principle and its counter-principle in law (*e.g.*, one is liable only for reasonably foreseeable damage vs. the tortfeasor who must take the victim as found) shows that these principles are contradictory, and that our law expresses two mutually inconsistent visions of our society. *See* Hutchinson, *Of Kings and Dirty Rascals: The Struggle for Democracy*, 1985 QUEENS L.J. 273, 281-83. Dworkin argues that the indeterminacy thesis is based on a logical mistake:

> [T]he confident assignment of the two principles to two contradictory "visions" of society is procrustean and groundless. These principles are inevitable aspects of any decent response to the world's complexity. They differ only in their distribution of the risk of loss between two actors . . . and it is implausible to suppose that someone who makes that choice differently in different kinds of circumstances, fixing the loss on the actor in some and on the victim in another, is for that reason morally schizophrenic. . . . [So there is] no difficulty in accepting both at the level of abstract principle. These principles are sometimes competitive, but they are not contradictory.

Similarly, there is currently a theoretical argument, rooted in British analytical jurisprudence, that explains legal disagreement as the result of mere semantic confusion. Dworkin argues that this position is misguided because adopting it forces us to trivialize disputes between lawyers or judges. What the law *is*, in this view, is a matter of "plain fact." Hence, disagreements are explained in one of two ways: either the disputants are arguing past each other because they have unwittingly settled on conflicting definitions of fundamental legal concepts or, alternatively, the disputants have unwittingly stumbled into an argument about what the law should be. Thus, on this "plain fact" view, genuine substantive disputes about what the law is are exhaustively empirical. They are settled by merely "looking in the book" and cannot require judges, even in hard cases, to view conflicting precedents through a normative, interpretive lens.

According to Dworkin, adherents to this prevailing view have been paralyzed by what he calls the "semantic sting." They picture meaningful disagreement as possible "only if we all accept and follow the same criteria for deciding when our claims are sound."[16] Thus, if meaningful disagreement breaks down to the extent that disputants accept and follow different normative criteria, then genuine theoretical, rather than empirical, disputes about what law is will be impossible when those disputes arise from conflicting moral and legal norms. Dworkin argues that the existence of conflict in hard cases between competing normative legal criteria does not support the semantic theorist's inference of global skepticism about the possibility of having and thus resolving genuine theoretical disputes about law. The disputants' failure to share all of their normative legal criteria does not by itself show that the legal principles that they do share are insufficient to afford them a principled means for agreeing on the correct or best resolution of the dispute. After all, the disputants may even share the competing normative criteria and agree on their application in easier cases. If so, their conflict in hard cases is not conclusive evidence that the disputants are relying on inconsistent or incompatible norms. If the disputants also share a decisionmaking procedure that explains their agreement about how to order those norms in easier cases, then the competing legal norms may be commensurate and the disputants may have at their

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LAW'S EMPIRE, *supra* note 6, at 441-44 n.20. For Dworkin's general discussion of Critical Legal Studies, see *id.* at 271-75.

16. LAW'S EMPIRE, *supra* note 15, at 45.

disposal a means for approaching consensus in the more difficult cases.

Nevertheless, a question remains about how much divergence in basic normative legal criteria and political values is compatible with the practical possibility of reaching a principled resolution of a genuine theoretical dispute about the proper interpretation of law. If it is possible for semantic legal theorists to have missed the mark so long and so completely, as Dworkin contends,[17] then it is surely conceivable that some disputes will on occasion arise from a conflict of normative legal criteria that *seems* so intractable as not to admit practically of resolution by appeal to shared principles of a higher order that yield agreement on the "best" interpretation of the law.[18] Hence, the possibility that an omniscient judge with Olympian legal prowess could interpret conflicting legal precedent so as to provide the best principled resolution of the dispute is scant comfort to those mortals laboring in the trenches of law. They seek the practical but elusive decisionmaking procedure of a mechanical jurisprudence: one that minimizes apparently intractable legal conflict through the application of priority rules that individually resemble the rules of statutory construction insofar as they can be applied mechanically in easy cases, but collectively differ from the rules of construction insofar as they severally advance just the kinds of equitable considerations, policies, and conceptions of institutional fairness that seem to conflict intractably in hard cases. Thus, some caution is in order. Even assuming *arguendo* that there is a right answer, as a matter of law, for every hard case, it does not follow that such answers will always be practically demonstrable.[19] So the claim

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17. *See id.* at 101-04. Dworkin discusses the long-standing verbal dispute between Positivists and Natural Law theorists concerning whether the Nazis had law. Positivists held that the Nazis did have law but argued that it should have been disobeyed by German citizens because it was immoral. Natural law theory, on the other hand, held that Nazi statutes and court decisions were patently immoral and, therefore, they did not count as laws. Hence, there was no reason to obey them. Dworkin suggests that the disputants here argue at cross purposes—they do not entertain a genuine theoretical dispute—because they have addressed the wrong issue. The real issue is not whether the Nazis *had* law, but whether (1) German citizens had a *political* obligation to obey the laws and (2) the state could *legitimately* compel obedience to its laws. *Id.*

18. It may be that Dworkin would agree on this point but would advocate shifting the burden of proving that a particular disagreement was not a genuine theoretical dispute to the semantic theorist, because the risk of unacceptable trivialization of disagreement that would otherwise result ought to create a presumption in favor of a genuine theoretical disagreement. For an earlier account of Dworkin's views on theoretical disagreement in hard cases, see R. DWORKIN, *Hard Cases* and *Can Rights Be Controversial?*, in TAKING RIGHTS SERIOUSLY 81, 279 (1977).

19. For an earlier argument for the claim that hard cases have right answers, even if

that hard cases have right answers will be of limited use in deciding what those answers are. The general force, however, of Dworkin's attack on semantic legal theories remains intact: no realistic account of theoretical legal disagreement can routinely view disputants as playing a game of legal charades.[20]

III. LAW AS AN INTERPRETIVE CONCEPT

Having drawn the semantic sting, Dworkin argues that law is an interpretive concept. In arguing and deciding hard cases, ordinary citizens, lawyers, and judges must read the law with an interpretive attitude. According to Dworkin, the interpretive attitude has two distinct and independent components.[21] First, the interpretive attitude assumes that rule-governed social practices such as courtesy not only exist but also have value because they have a purpose.[22] Second, the judgments and conduct required by the rules of that practice are not limited by the history of the practice but are sensitive to its point. Thus, the interpretive attitude introduces an element of purposive flexibility into the future construction and application of the rules governing the practice; interpreters impose meaning on the practice in an effort to view it in its best light and, having done this, they reconstruct the practice in light of that meaning.

A. Conversational vs. Constructive Interpretation

Dworkin distinguishes two major approaches to interpretation. *Conversational* interpretation involves attributing meaning to the speech or writings of another in order to determine what has been said. *Creative* interpretation is concerned with interpreting some-

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no procedure exists in principle for demonstrating the legal rights of the parties, see R. DWORKIN, *Can Rights be Controversial?*, in TAKING RIGHTS SERIOUSLY 279 (1977).

20. For criticism of Dworkin's account of the participant's internal point of view and his attack on semantic theories of law, see Soper, *Dworkin's Domain*, 100 HARV. L. REV. 1166, 1172-76 (1987).

21. LAW'S EMPIRE, *supra* note 6, at 46-48.

22. *Id.* at 47. For a related view, see L. FULLER, THE MORALITY OF LAW (1964), which argues that formalistic treatments of law are inadequate, because they fail to account for the fact that legal institutions are essentially purposive collections of rules designed and intended to advance human interests and values. Fuller's views on morality in law continue to command critical attention. *See* Wueste, *Fuller's Processual Philosophy of Law*, 71 CORNELL L. REV. 1205-30 (1986); R.S. SUMMERS, LON L. FULLER (1984), *reviewed in* LeBel, *Blame This Messenger: Summers on Fuller*, 83 MICH. L. REV. 717 (1985). For a comparison of Dworkin's views on the nature of adjudication with those of Fuller, see Winston, *Taking Dworkin Seriously*, 13 HARV. C.R.-C.L. L. REV. 201 (1978), and Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

thing created by people—such as art objects or social practices—as distinct entities with a life and purpose of their own. Dworkin acknowledges, however, that there is a deep connection[23] between the creative interpretation of social practices, or of works of art or law, and the conversational interpretation of a speaker's remarks: both kinds of interpretation are concerned with attributing purposes, rather than mere causes, to their objects. Moreover, the interpretation of conversation also involves employing presumptions, such as the principle of charity, so as to make the author's remarks intelligible and plausible. Thus, both kinds of interpretation try to make their objects the best they can be. But Dworkin argues that creative interpretation is not conversational but *constructive*.[24] Constructive interpretation is concerned essentially *not* with the purposes of the author but with those of the interpreter; it is an activity in which the interpreter imposes purpose on an object or practice in order to make it the best possible example of its form or genre. The available interpretations, however, and thus the interpretive activity itself, are constrained by the history and form of the practice or work of art. Thus, the constructive interpreter is not free to make the practice better than the best it can be, let alone anything he or she likes.

Following Cavell,[25] Dworkin rejects the thesis that creative interpretation in the arts properly aims to discover the author's conscious historical intention. The extent to which the best interpretation of a work of art must be faithful to the author's historical intention will depend upon whether accepting the author's intention will permit interpretation to make the art object the best it can be.[26] Similarly, the purpose or point to which the internal structure of an argumentative social practice is directed must be logically distinguished from the intentions or purposes of individual participants in that practice, since their claims and arguments are about what the *practice* means and not about what *they* mean.[27] Because trying to decide what other members of the community believe the social practice requires can be distinguished from determining what the practice itself really requires, the conversational interpretive attitude appropriate to the former inquiry will be inappropriate in in-

23. LAW'S EMPIRE, *supra* note 6, at 53.

24. *Id.* at 52. *See generally* J. HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (1984); H. GADAMER, TRUTH AND METHOD (G. Barden & J. Cumming trans. 2d ed. 1975).

25. S. CAVELL, MUST WE MEAN WHAT WE SAY? 213-37 (1969).

26. LAW'S EMPIRE, *supra* note 6, at 62.

27. *Id.* at 63.

terpreting the practice itself. This is true, Dworkin suggests, even if we could ascribe to the community itself beliefs or convictions about what the practice required. In this case, we must still distinguish between what the community believes the practice requires and what the *practice* really requires.[28]

Dworkin's argument, which relies on an ontology that permits purposes to actually subsist in the social practices themselves, as distinct from the community or persons who engage in those practices, is unconvincing for two reasons. First, the argument seems to allow that a community's belief about what that community's social practice requires could be mistaken—that the community itself, and not merely those individuals who are its members, could in effect be deceived about what its own social practices really require. This implication appears to commit Dworkin to the view that creative interpretation can provide individuals who are internal to the community practice with a vantage point on that practice epistemically superior to that of the community itself. If this view is correct, then a disagreement between two constructive interpreters within the community about the purpose or principle behind a practice or a set of precedents could not be settled by appeal to the community's beliefs about the purpose or requirements of its own practice, as understood through a conversational interpretation of that community's beliefs about that practice.

Second, Dworkin's argument overlooks a crucial point. If the community personified can have beliefs or convictions about what its practices require of its members, and if it must be capable of agency, as Dworkin argues,[29] then that personified community can have a purpose in adopting or retaining a practice and can itself make demands or requirements on its members through that practice. Thus, the community personified must itself have the last word, conversationally interpreted, on the purpose and requirements of its practices. This follows from the paradigmatic primacy of ascribing purposes to agents or persons rather than to objects or social practices. Language that predicates purposes of objects or social practices is not quite metaphorical, but it is derivative of and dependent on our practice of attributing purposes to those persons who would use the objects or who would adopt or engage in the social practices. Hence, the heuristic primacy of conversational interpretation for the purpose of ascertaining the point of a commu-

28. *Id.* at 64-65.
29. *Id.* at 167-75.

nity's practices undermines Dworkin's claim that creative interpretation alone provides authoritative access to the purposes behind those social practices adopted by a community personified.

B. The Analysis of Constructive Interpretation

According to Dworkin, there are three analytical stages involved in constructive interpretation.[30] In the pre-interpretive stage the interpreter compiles an inventory of beliefs or convictions about what counts as part of the practice to be interpreted. Thus, the rules or standards defining the practice are identified. In the interpretive stage the interpreter determines a general justification or purpose for the central features of the defined practice. Finally, in the post-interpretive or reform stage, the interpreter revises his or her understanding of what the practice really requires in order to promote the purpose or justification accepted at the interpretive stage.[31] But Dworkin also describes the post-interpretive or reform stage as one in which the interpreter arrives at a substantive conviction "about which kinds of justification really would show the practice in the best light."[32]

Dworkin's two formulations of the post-interpretive stage, however, appear occasionally to drive the interpreter to make different and conflicting interpretations. Suppose that a judge determines at the interpretive stage that the purpose best promoted historically by a body of precedent is unjust. Under the first formulation of the post-interpretive stage, the judge would be required to revise the understanding of those precedents so as better to promote, in application, their unjust purpose. On the other hand, the second formulation would require the judge to adjust the understanding of how best to apply an existing body of precedent so as to impose upon it a more just but less historically faithful purpose.

This tension can never be adequately resolved because a prior, related difficulty arises if one tries clearly to distinguish Dworkin's interpretive and post-interpretive stages, understood as stages of *interpretation*. If the purpose discerned in or imposed upon a practice or body of precedent was rationally determined, then activity at the interpretive stage must be rule-guided.[33] But if that interpretive ac-

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30. *Id.* at 65-68.

31. *Id.* at 66.

32. *Id.* at 67.

33. Although rational activity must be rule-guided, this paradoxically does not mean that conduct that constitutes following a rule (or action taken pursuant to a rule) is wholly determinate or can be predicted by criteria specified in advance. Indeed, it has

tivity is itself bound both by constraints of fit—the minimally acceptable degree of coherence with precedent—and by normative rules such as the interpretive principle of charity, then the interpretive stage will necessarily show the practice or precedents in the best light; that is, it will already show "why a practice of that general shape is worth pursuing, if it is."[34] If this view is correct, then nothing is left to do after the interpretive stage except *either* to adopt the rule *or* to reject it in pursuit of extra-interpretive reform. Thus, any sharp analytical distinction between reading and interpretive reform breaks down because these activities are both inseparable components of the interpretive stage. Consequently, the activity that remains for Dworkin's *post*-interpretive stage is not one that many judges will easily recognize to be part of the *interpretive* enterprise. From their perspective—one internal to the legal practice of construing precedents—post-interpretive politics surely goes beyond making the law the best it *can* be in its concern to make the law *better* than it is.

C. *Skepticism About Morality and Interpretation*

This result is natural and inescapable because Dworkin first contends that judges, even in hard cases, are properly concerned with what the law is, and then argues that empirical discovery does not provide the correct model for judicial inquiry. Hence, the process of arriving at the law through constructive interpretation is more closely akin to deciding what the right answer is to some controversial moral issue: one proceeds by way of discursive normative argument with other members of the moral community. Since skepticism about ethics is widely thought to undermine the defensibility

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been persuasively argued that it is impossible to state exhaustively criteria that can establish authoritatively whether or not a rule is being followed. Thus, rational *rule-guided* behavior can be distinguished from determinate *rule-governed* behavior (*e.g.*, planetary motion in conformity with the laws of physics). This does not show, as the Realists and members of Critical Legal Studies suppose, that legal rules are wholly indeterminate. This is because the solution to the paradox is to eschew the quest for necessary and sufficient truth conditions for the statement, "[t]he judge is following the rule," in favor of an account that grounds the justification for asserting such a statement in the understanding and practices of the interpretive community of the speaker. *See* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (2d ed. 1958). For a contemporary discussion of Wittgenstein's views on "rule-skepticism," see R. FOGELIN, WITTGENSTEIN 138-71 (1976), and a more recent elaboration of Fogelin's arguments in S. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982), *reviewed in* Yablon, Book Review, 96 YALE L.J. 613 (1987). For critical discussions of rule-skepticism that are particularly pertinent to the indeterminacy thesis, see G. BAKER & P. HACKER, SCEPTICISM, RULES AND LANGUAGE (1984), and Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1690-93 (1986).

34. LAW'S EMPIRE, *supra* note 6, at 66.

of moral discourse, Dworkin anticipates a similar skeptical challenge to constructive interpretation. Skepticism about interpretation is the view that all interpretive claims are subjective; therefore, no interpretation is ever best or superior to others.[35]

To defeat this skeptical challenge, Dworkin adopts a "divide and conquer" strategy. First, Dworkin defines internal skepticism as skepticism *within* the interpretive enterprise or within the enterprise of advancing normative arguments in support of a particular position.[36] Thus, the internal skeptic relies on the soundness of certain widely shared interpretive principles or moral judgments to persuade us that a particular practice does not have a coherent point or that a particular moral or legal issue does not admit of a defensible answer *relative* to our community's background consensus. The internal skeptic will advance interpretive considerations or normative arguments to support this contention. Next, Dworkin distinguishes external skepticism as a metaphysical theory *about* the interpretive enterprise, or outside of normative ethical discourse, that holds that *all* interpretations and moral judgments are subjective.[37] On this view, interpretations and moral judgments are merely projections that fail to refer to any objective, discoverable reality.

Having thus split their ranks, Dworkin would vanquish skeptics with their own inconsistency. External skeptics mistakenly think their attack has the force of internal skepticism, *i.e.*, that external skepticism justifies the claim that we *should* not talk or act as if any one interpretation or moral judgment is right to the exclusion of others. Dworkin argues that external skeptics cannot consistently make this latter claim because it is itself a normative claim and must be defended from a position *internal* to the enterprise of making and evaluating particular normative arguments.[38] Since external skepticism provides no reason internal to an interpretive practice to retract or modify legal interpretation or a moral judgment, it cannot threaten any, let alone every, interpretive or normative project. Moreover, one ready to defend some interpretive or moral claim—

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35. *Id.* at 76. For a general discussion of and debate over creative interpretation, see Dworkin, *Law as Interpretation*, in THE POLITICS OF INTERPRETATION 249 (W. Mitchell ed. 1983); Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982); Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More*, in THE POLITICS OF INTERPRETATION 287 (W. Mitchell ed. 1983); Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983).

36. LAW'S EMPIRE, *supra* note 6, at 78-79.

37. *Id.* at 79-80.

38. *Id.* at 82-84.

such as that genocide is wrong—cannot consistently take up the defense of global internal skepticism.

Although Dworkin is correct that global internal skepticism provides a heavy intellectual burden for its adherents, his dismissal of external skepticism is much less satisfying. While external skepticism provides no reason to modify our particular legal interpretations or moral convictions, it does provide grounds for their wholesale reclassification: none of our interpretations or convictions are objective, empirical claims about the way the world *is*.[39] The external skeptic need not assert that we should not talk or act as though one interpretation or normative claim is superior to others. Instead, he doubts that a coherent account can be given of what it *means* to say that one interpretation is objectively the best among all contenders when the interpretations of a particular community are not neutral, relative to those of other communities, insofar as all interpretations impose a particular set of culturally shared values on a social practice. The unavailability of such an account does not provide a ground for levelling all of the competing interpretations or normative claims that vie for dominance within a particular interpretive community. Relative to those judgments shared within a particular community, some interpretations will provide a superior fit with those judgments than do others. But this result provides scant satisfaction or reassurance for those who want to understand and defend the claim that our laws are, in this *external* sense, objectively better than those, for example, of the Nazis. Merely to assert that they are, relative to those values shared by our community, begs the question. Dworkin seems committed to accepting this impasse when he contends that the political virtues are not external to sovereigns and that "[i]ntegrity holds within political communities, not among them."[40]

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39. *Id.* at 79-80.

40. *Id.* at 208-15. On this and a related point, Bruce Ackerman notes that

> [i]n considering this question [whether it makes sense to insist that power be mediated through neutral dialogue], *we are no longer examining the kinds of argument that are admissible within the practice of liberal politics. What is at stake now is the justification of the entire practice of liberal argument, considered as a whole.* Moreover, Hart and Rawls have taught us to recognize the importance of this shift in conversational key. As they have argued persuasively, *there is no reason to insist that the reasons advanced in support of an entire practice be identical to those that are admissible within the practice.* Applying their point to the present problem: while Neutrality excludes a broad range of normative argument from the practice of liberal politics, it does not follow that these arguments should also be excluded when the subject is the justification of the entire practice of liberal argument, considered as a whole. Indeed, it would be a category mistake to imagine that there could

This impasse shows not that there is deep error in the interpretive attitude, but that those same features of the attitude that enable it to do its work relative to a set of shared community values also preclude it from settling interpretive disputes between communities insofar as their moral and political values are incommensurate.[41] Nevertheless, Dworkin does argue convincingly that lawyers and other members of the political community who argue in support of particular interpretations of the law cannot then consistently appeal to external skepticism to support a global internal skepticism about interpretation of the law.

IV. EVALUATING COMPETING INTERPRETATIONS OF LAW

Having rebuffed the skeptic and articulated the sense in which law is an interpretive concept, Dworkin makes a pivotal move by directing the interpretive attitude to legal practice as a whole. The most abstract and fundamental point of legal practice, he argues,

> is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to the ends in view . . . except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.[42]

Thus, any adequate conception of law and adjudication will not only have to account for the way judges actually decide hard cases, but it will also have to account for this central purpose of legal practice—the legitimization of political coercion by reference to prior political decisions justifying the state's exercise or restraint of power. Of the various conceptions of law that might be held up to this standard, Dworkin considers three: conventionalism, pragmatism, and law as integrity. Conspicuous by their absence from this list are natural law theories, which provide that citizens have inherent political rights against the state regardless of whether legal institutions expressly recognize those rights. Such a notable absence may be explained by the fact that Dworkin's interpretive formulation of the central point of legal practice—the legitimization of legal coercion only where in-

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be a Neutral justification for the practice of Neutral justification—for Neutrality makes no sense except as a part of the practice it constitutes.

Ackerman, *What Is Neutral About Neutrality?*, 93 ETHICS 372, 387 (1983) (citing H. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY (1968); Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) (emphasis added)).

41. *See* B. WILLIAMS, *The Truth in Relativism*, in MORAL LUCK (1981).

42. LAW'S EMPIRE, *supra* note 6, at 93.

dividual rights and responsibilities *flow from past political decisions* about when force is justified—appears to beg the naturalist-positivist dispute about the ultimate source of individual political rights in favor of positivism.[43]

A. Fit and Justification

As Dworkin examines each of these three conceptions of law, he measures them against the general point of legal practice, that is, according to the answers they give to the following three questions: (1) Is the use of force justified by past political decisions? (2) If so, why? (3) How does the justification for political coercion flow from past decisions? Dworkin argues that a fully adequate evaluation of any conception of law must account for an important distinction that is recognized both by ordinary citizens and by positivist semantic theorists such as Austin and Hart. This is the distinction between the *grounds* of law or what determines what the law *is*, and the *force* of law or whether there are good political reasons why anyone *ought* to enforce or obey it. Because the development of a complete theory of jurisprudence is a three-stage interpretive enterprise, rather than

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43. For a contemporary theory of natural law jurisprudence, see J. FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980). Although Dworkin argues that moral judgment is an integral part of interpreting the law, and thus deciding what the law is, *see* Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165 (1982), his brand of liberal jurisprudence remains recalcitrant to an essential characteristic of traditional natural law theories, *i.e.*, the enterprise of deriving or defending a scheme of general political rights independent of the history and background political theory of the particular societies in which those rights are to have currency.

Thus, according to Dworkin, political rights are those special moral considerations that are recognized, explicitly or implicitly, by various political communities as constraints on the particular background justifications they otherwise employ in the coercive ordering of their respective societies. Hence, a theory of rights (and so the substantive content of a community's political rights) can only be constructed and defended relative to a particular community's background political theory. Dworkin argues, for example, that in our own society (and contemporary liberal democracies generally) the background procedural justification for enforcing particular social choices is majoritarian, and the background substantive justification for particular laws and policies is generally utilitarian. Consequently, minority and individual rights are understood as legal trumps against our society's background political theory to the extent that they insure equal concern and respect for individuals and so preclude the unjust effects of a democratic majority's unconstrained utilitarian preferences. Thus, since political rights are neither timeless nor immutable, but vary in contrast to a community's background political justifications, controversy about what rights we have will be attributable in part to disagreements about what our background principles of social choice are and ought to be. *See* LAW'S EMPIRE, *supra* note 6, at 117, 296; R. DWORKIN, A MATTER OF PRINCIPLE 359-72 (1985); R. DWORKIN, TAKING RIGHTS SERIOUSLY 87 (1977); Green, *The Political Content of Legal Theory*, 17 PHIL. SOC. SCI. 1, 8-9 (1987); Dworkin, *A Reply by R. Dworkin*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247, 281-82, 289-92 (M. Cohen ed. 1984).

an analytical one, it must address both of these issues. Thus, an adequate theory of jurisprudence must show at the interpretive stage whether and why a particular conception of law provides a good *fit* with our legal practice, and it must show at the post-interpretive stage whether and how that conception of law *justifies* our legal practice. Hence, the best available conception of law will address our concern about the grounds of law with the answer it gives to the third question, and it will address our concern about the force of law with the answers it gives to the first and second questions.

B. Conventionalism

According to Dworkin, conventionalism answers the first question affirmatively.[44] The use of force is justified by past political decisions as provided in case precedents, statutes, rules of construction, and principles of equity. Specifically, the conventionalist looks to the black letter of these past political decisions as a guide in interpreting the law understood as a set of rules agreed upon by the political community. Coercive force is justified only to the extent that past political decisions give fair warning to the parties that they may expect force to be exercised in a particular manner based on the facts of their case. The attraction of conventionalism is that it justifies an exercise of force only if it comports with the ideal of protected expectations.[45] Consequently, past political decisions cannot yield rights and duties that are not explicit in the black letter of the law, that is, in rules expressly sanctioned by convention.

Dworkin argues that conventionalism is dangerous precisely because it provides no guidance in hard cases or in cases of first impression. In these cases, the black letter is silent, and thus the ultimate decision cannot flow from past political decisions interpreted as conventions. Consequently, the judges who decide such cases may exercise wholly unfettered discretion. The law provides no guidance in these cases because there is no law applicable to the issues they raise. Because conventionalist judges deciding these cases cannot advance the ideal of protected expectations, they cannot violate it either. Consequently, they are free to make law in ac-

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44. LAW'S EMPIRE, *supra* note 6, at 116. Various versions of conventionalism are advanced and defended in Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1976); Lyons, *Principles, Positivism, and Legal Theory*, 87 YALE L.J. 415 (1977); and Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982).

45. LAW'S EMPIRE, *supra* note 6, at 117.

cordance with a variety of considerations, such as their political or moral convictions, their beliefs about what a hypothetical legislature might do under the circumstances, or their policy preferences. But this is surely not what judges do or, in any case, ought to do. Conventionalism thus fails as an interpretation of our legal practice. It fails the test of *fit*, because in hard cases judges attend to conventional sources of law, such as statutes or precedents, more carefully than conventionalism permits.[46] Judges suppose that their close reading of the law is correct, while acknowledging that it is controversial because it conflicts with other reasonable interpretations of the law that respect the same conventions.

Moreover, conventionalism fails to *justify* our practice because the decision in a hard case cannot rely on or appeal to existing conventions. Of course, that decision will prospectively expand existing legal conventions, thereby creating new or additional expectations for future litigants in similar situations. Thus, coercion pursuant to a future ruling that is in accord with the present one will be justified because it will protect the newfound expectations of the future litigants. On the other hand, the present decision is binding on the parties only in the weak sense that it will be enforced. But this decision, on the conventionalist's account, must fail to justify the political coercion that is exercised pursuant to its enforcement. Thus, conventionalism fails because coercion in hard cases cannot be exercised with political legitimacy or authority. Instead of being treated in a principled way, the litigants become instruments for the extemporaneous advancement of social policy by activist judges.

Finally, Dworkin argues that conventionalism fails to justify our practice because it is an inflexible conception of law. It requires judges to decide a case in accord with express legal conventions whenever these are clearly applicable. Such a conception of law will inevitably purchase the protection of our predictive expectations at the price of disappointing our normative expectations. Thus, some hard cases will make bad law under conventionalism because they will require judges to follow clearly applicable precedent even though this results in an unjust outcome in the case at hand. We expect justice to be done even if it occasionally requires abrogating some black letter law to the surprise of those who have come to rely on it. Thus, conventionalism also fails to justify our practice because it does not allow for a degree of adjudicative flexibility sufficient to insure that a technical respect for precedent does not

46. *Id.* at 130.

triumph over justice.[47]

C. *Pragmatism*

Pragmatism, on the other hand, appears to be a more promising conception of law because it initially seems to provide the flexibility missing from conventionalism. The pragmatist locates the justification for coercion in the justice or efficiency of the immediate political decision itself, without regard for its consistency or fit with past legislative or judicial decisions. Pragmatism portrays judges as deciding first how the case should be disposed so as best to promote justice or further some moral or political ideal. Having done this, judges use their rhetorical skills and a selective reading of precedent to make their decision appear the best possible fit with the past. Thus, judges are secretly advocates who litigate in the interest of society, as viewed through their moral and ideological commitments.

Dworkin argues that pragmatism fails as an interpretation of our legal practice, first, because it fails the test of *fit*. It cannot plausibly account for legal rights, which our practice recognizes as trumps over various utilitarian policies intended to promote the interests of society.[48] In hard cases judges in their opinions announce to us and to each other that they have carefully interpreted the law in order to determine the rights of the parties. Thus, judges view legal rights as having their source in past political decisions. Pragmatism responds to this central concern of our legal practice by explaining it away: people are treated as if they had rights only in the interest of furthering some social or political agenda. Talk of rights is a subterfuge, a noble lie strategically employed to deceive the public and purchase apparent judicial authority for the advancement of social policy.[49] Thus, pragmatism does not fit our practice because it fails to take rights seriously.[50]

Second, Dworkin argues that pragmatism fails to *justify* our practice. Instead, it is a skeptical conception of law that denies the central point or purpose of our legal practice, namely, the concomitant justification of political coercion and legal rights by appeal to a

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47. *Id.* at 124-30. Dworkin is unfair to conventionalism to the extent that he intermarries conventionalism as a theory of *scope* (what the law is) with conventionalism about how to *read* the law and then complains that in hard cases there is no superconvention to resolve the conflict between black letter precedent and equity. *Id.*

48. *Id.* at 160.

49. *Id.* at 154-60.

50. *Id.* at 160-61.

principled interpretation of our collective past political decisions. Because it requires courts to legislate retroactively forward-looking policies through judicial activism, pragmatism fails to constrain adjudication by requiring political force to be exercised consistent with that principle which provides the best interpretation of the legal precedents. Hence, pragmatism mistakes the strategic reconstruction of precedent by policy for that flexible but principled interpretation of black letter law that was missing from conventionalism.[51] Pragmatism escapes the dead hand of the past only to plunge headlong into the arms of a skeptical spectre: precedent cannot justify because it does not constrain.

Although Dworkin is confident that conventionalism and pragmatism are both pretenders to the throne of law's empire, he remains sensitive to the normative challenge pragmatism poses for any conception of law that ties the political justification for a decision to its consistency or fit with the best interpretation of precedent:

> If . . . controversial judgments are in [hard cases] inevitable, the pragmatist asks, why should the controversy not be about what really matters, about which decision will produce the . . . fewest occasions of injustice in the future? How can that goal itself be unjust? How can consistency in principle be important for its own sake, particularly when it is uncertain and controversial what consistency really requires? These are the questions we must answer if we wish to sustain legal rights against the pragmatist challenge . . . . [I]f we cannot sustain the importance of consistency in principle against the charge of fetishism, we must reconsider the popular disdain for pragmatism as an interpreta-

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51. *Id.* Dworkin earlier distinguished rules, principles, and policies. A policy is a standard that defines a goal to be reached by society, and is generally directed toward improving some social, political, or economic feature of the community (*e.g.*, lowering speed limits to decrease automobile accidents). Principles are standards that are observed, not because they advance policy interests, but because they express the requirements of justice, fairness, or other aspects of morality (*e.g.*, no man may profit from his own wrong). Both principles and rules point to particular decisions, but differ essentially in how they direct action. A rule is a normative formula that takes account of exceptions and applies in a determinate, all-or-nothing fashion, according to whether the facts stipulated in the rule obtain or not. So if two rules conflict, one of them will be invalid. But principles direct decision not mechanically, but along the dimension of weight, and they are not engaged by precisely formulated factual preconditions set out in advance. The fact that principles may conflict in their application to particular circumstances requires resolution by judgment, or a weighing of the equities, and does not show that either principle is invalid. *See* R. DWORKIN, *The Model of Rules I, The Model of Rules II*, and *Hard Cases*, in TAKING RIGHTS SERIOUSLY 14, 46, 81 (1977).

tion of our legal practice.[52]

V. INTERPRETING LAW AS INTEGRITY

A. The Political Virtues

Dworkin begins his answer to this challenge by distinguishing four political virtues, which he calls fairness, justice, procedural due process, and integrity.[53] Fairness is the political virtue of procedures and practices that distribute political power in a way that enables all citizens to exercise approximately equal influence over the decisionmaking bodies and institutions that govern them. Justice, on the other hand, is the political virtue that attaches to the decisions of these institutions according to whether those decisions distribute wealth and allocate rights and liberties in a morally defensible way.[54] Both of these virtues are recognized by pragmatism and served by policies intended to advance the concrete convictions about fairness and justice that individual judges hold and other members of the political community share. Dworkin claims that "[o]rdinary politics adds to these familiar ideals a further one that has no distinct place in utopian axiomatic theory."[55] This ideal is integrity, the political virtue that treats like cases alike and "requires government to speak with one voice, to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some."[56] Thus, both the equal protection clause and the motto "*equal* justice for all" reveal the commitment of our legal system to the virtue of integrity.

Moreover, political integrity is analogous to personal moral integrity insofar as we want our community, as well as our associates, not only to treat us justly, but when our conceptions of justice diverge, with integrity—that is, according to settled convictions rather than caprice. Integrity is not a utopian political virtue. Instead, it

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52. LAW'S EMPIRE, *supra* note 6, at 163.

53. *Id.* at 164-68.

54. *Id.* at 73-74. Dworkin defines the virtue or *concept* of justice in this abstract and somewhat empty fashion in order to allow for the fact that pluralistic societies, such as ours, entertain competing *conceptions* of justice, and so that these conceptions may all be understood to be conceptions of the same concept or virtue of justice. This is done in order to avoid incorporating a question-begging concept of justice within his theory of jurisprudence and to enable different conceptions of justice to be accommodated and comparatively evaluated within that theory. *Id.* Here he follows an approach similar to that in J. RAWLS, A THEORY OF JUSTICE (1971).

55. LAW'S EMPIRE, *supra* note 6, at 165.

56. *Id.*

requires the political community to stand by its principles even if they are flawed or fundamentally misguided from a utopian point of view. If we can treat the political community as a moral agent, then we can demand that it treat its citizens with integrity because we can understand and require another person to treat us according to a coherent, unified conception of justice, even if it is one to which we ourselves do not subscribe.

B. Three Arguments About Integrity

This does not show, however, that integrity is a distinct political virtue, rather than an aspect of justice, nor that integrity is necessary to justify political coercion. In order to demonstrate the distinct essence and necessity of integrity, Dworkin sets out a complex series of arguments that lie at the heart of *Law's Empire*. If these arguments cannot withstand scrutiny, then integrity will fail as a conception of law, and by his own account Dworkin will be left to acknowledge an intractable skepticism concerning the adjudication of hard cases and the justification of political coercion. These arguments purport to show that: (1) predicating political integrity of our community presupposes a deep and irreducible *personification* of that community; (2) only its prior commitment to the political virtue of integrity can explain our community's rejection of *checkerboard laws*—laws that treat similar conduct differently on arbitrary grounds in order to effect a political compromise; and (3) political coercion by a *community of principle*—a fraternal or associative community that accepts the ideal of integrity—is justified because the members of such a community have political obligations to one another. The first argument is advanced in order to provide the foundation for a literal attribution of agency and responsibility to political communities—an attribution that is implicit in the constructive interpretation of our community's laws and social practices. The second argument is intended to show that an interpretation of law that provides a central role for integrity provides a better fit with our practice than do interpretations, such as pragmatism, that only recognize justice and fairness as political virtues. The third argument is intended to show that interpreting the law to express integrity is necessary to justify our practice of exercising political coercion to enforce political decisions. These arguments are developed, and criticized, as follows.

1. Can Political Communities Be Personified?—First, Dworkin argues that political communities can be committed to principles of justice, fairness, or integrity just as a person can be committed to these ideals. In particular, his account of integrity treats the community

as an entity distinct from those people who are its citizens and attributes moral agency and responsibility to that entity. Moreover, Dworkin contends that a community can act according to or against its own principles and not merely according to or against the popular morality or convictions shared by most of its members.[57] Although group personification in ordinary language is sometimes only an elliptical way of generalizing about the attributes of its members, Dworkin thinks that the attribution of group responsibility expressed in terms of the personification of community cannot be reduced to a set of separate claims ascribing personal responsibility to the individual officials and citizens of that community.

Dworkin supports this contention by drawing a familiar analogy with the liabilities of corporations that produce defective products. It might be that no individual employee or stockholder of the corporation acted wrongly, and so none are personally responsible for the victim's injuries. Nevertheless, we can *treat* the corporation itself as a moral agent, first by attributing fault to it, and then by proceeding to decide how its shareholders should share in their corporation's liability. But Dworkin insists that since we are not interested in personification and the ascription of group responsibility for its own sake, the community, like the corporation, has *no* independent metaphysical existence. This model of community personification is also supposed to explain why it is possible and rational for contemporary Germans to feel shame for the acts of their Nazi forebearers, without doing violence to the moral precept that one is not to be blamed for what he or she has not done.[58]

Corporate liability and, by analogy, community responsibility are supposed to be *nonreducible* on Dworkin's account, even though corporations and communities themselves have no mysterious, independent metaphysical existence. Yet this approach seems to leave Dworkin on the horns of a dilemma. On the one hand, a good case can be made that corporations can only act through their agents and that corporate liability is exhausted, without residue, by the allocation of liability among the shareholders.[59] Of course, there are practical reasons for treating a corporation—a complex aggregation of parties or set of interconnected interests and roles—as if it were a single unified legal person.[60] Nevertheless, even

57. *Id.* at 167-68.

58. *Id.* at 168-75.

59. *See* Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1652-58 (1982).

60. *Id. See generally* T. DONALDSON, CORPORATIONS AND MORALITY (1982) (discussing

though judgments are rendered against corporations and not their shareholders, *per se*, no one directly suffers the subsequent loss of corporate assets over and above the shareholders. So a corporation's liability, at least, *is* reducible, even though no individual agent, employee or shareholder of that corporation personally acted wrongly. There is a further problem for Dworkin's analogy. Shareholders freely assume the risk of liability when they invest in the corporation. They *purchase* risk and their liability extends only so far as their investment. But contemporary Germans are not similarly situated. They did not act wrongly and they did not purchase the risk of liability or shame for the acts of their forebearers. So the justification and rationality of their shame will not be analogous to the justification of shareholder liability.

On the other hand, assuming Dworkin's analogy can be salvaged, his claim that corporate and community personality are nonreducible will be inconsistent with his claim that personified corporations and communities have no independent metaphysical existence. Personified corporations and communities must *either* be included in Dworkin's ontology, in which case they have an independent metaphysical existence, *or* omitted, in which case they are reducible to "what there is"—an aggregation of related actors and interests.[61] Thus, Dworkin's claim that he is only endorsing "a complex, two-stage way of reasoning about . . . responsibilities . . . that finds a natural expression in the personification of community"[62] will not relieve the language of his account of its ontological commitments[63] to communities with an independent metaphysical

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the moral status of corporations as juristic persons); French, *The Corporation as a Moral Person*, 3 AM. PHIL. Q. 207 (1979); Goodpaster, *Morality and Organizations*, in PROCEEDINGS OF THE SECOND NATIONAL CONFERENCE ON BUSINESS ETHICS (M. Hoffman ed. 1977).

61. *See* W. QUINE, *On What There Is*, in FROM A LOGICAL POINT OF VIEW 1-19 (2d ed. 1961).

62. LAW'S EMPIRE, *supra* note 6, at 168-69.

63. Ontological questions are concerned with what are the most basic categories of entities that actually exist (*e.g.*, physical objects, numbers, classes, sensations, universals, particulars, relations) and the extent to which other, ontologically fictitious entities can be reduced or explained away in terms of the basic entities without residue. Thus, the question of *whether* and in what *sense* Dworkin's personified communities exist *independently* of the individual citizens that make up their membership is an ontological question. It may be argued that abstract entities, such as personified communities, exist but in a different sense of the word "exist" from that in which their members are said to exist. But whether the word "exist" is genuinely equivocal in this fashion is open to question.

Quine and others have argued persuasively that the theories we embrace—indeed the ordinary assertions we make about our world—carry with them *ontological commitments*. That is, the adoption of a theory commits one to an ontology (*i.e.*, a scheme that

existence.

2. Does Integrity Explain Our Practice?—Dworkin's second argument sets out to show that integrity is a distinct political virtue of our community that provides a better fit with our legal practice than any conception of law that rejects it. In order to show this and to provide a test case for our political intuitions about fit, Dworkin introduces the notion of checkerboard laws. These are laws that treat citizens and substantially similar conduct differently on completely arbitrary grounds in order to effect a political compromise. An example of a checkerboard law would be a statute or court decision that allocated and limited abortion rights in proportion to the distribution in the political community of those citizens who favored or opposed these rights. Such a statute might confer the right only on women who conceive in even calendar years or who conceive during even years of their age. Dworkin observes that we severally and as a community reject laws that recognize such arbitrary distinctions when matters of principle are in issue. Instead, each interest or member of a constituency given a voice in political deliberation must be ready to partake in a collective decision to settle on one coherent principle rather than a patchwork rule. And even when citizens have divergent conceptions of justice, compromise within a community that accepts integrity occurs *external* to various coherent schemes of justice and is concerned with which scheme should be adopted. This contrasts with *internal* political compromise that is worked out within a scheme of justice and results in a compromised conception of justice.

Dworkin argues that we cannot account for our rejection of checkerboard laws by appealing to the political virtues of justice or fairness.[64] He contends, for instance, that checkerboard solutions

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posits certain types of entities) insofar as the truth of the theory presupposes the existence of the entities found in that ontology. Thus, Dworkin cannot have his theory of personified communities without the ontological commitments of its language. This is because

> we . . . have a[n] . . . explicit standard whereby to decide what ontology a given theory or form of discourse is committed to: a theory is committed to those and only those entities to which the bound variables of the theory must be capable of referring in order that the affirmations made in the theory be true.

W. QUINE, *supra* note 61, at 13-14. For a criticism of Quine's view, see Church, *Ontological Commitment*, 55 J. PHIL. 1008 (1958).

64. LAW'S EMPIRE, *supra* note 6, at 179. Dworkin states:

> [C]heckerboard laws are by hypothesis fairer than either of the two alternatives. Allowing each of two groups to choose some part of the law of abortion, in proportion to their numbers, is fairer (in our sense) than the winner-take-all

are not by definition unjust since they will eliminate *some* injustice in many political circumstances in which enforcing exceptionless compliance with a majority rule would increase justice. Thus, in ordinary politics, "checkerboard strategies will prevent instances of injustice that would otherwise occur, and we cannot say that justice requires not eliminating any injustice unless we can eliminate all."[65]

Nevertheless, Dworkin's argument is unfair to justice. One can equally maintain that checkerboard solutions by definition are not just, because checkerboard strategies will create some instances of injustice that otherwise would not occur and would, even in ordinary politics, be avoidable. Moreover, our shared, abstract *concept* of justice requires at least that an individual's conduct or a community's laws treat members of a class equally, when this is possible, regardless of which particular *conception* or theory of justice we endorse. This explains, perhaps, why it is rational for some egalitarian members of a group to complain that *their* entitlements to certain benefits, arbitrarily or accidentally denied to other members, are unjust *because* those entitlements could have been but were not extended to the others. If this understanding is right, then the ideal that Dworkin calls integrity may not be a distinct political virtue at all, but only an aspect of the *concept* of justice—albeit one that may conflict with our inclination to achieve a better or less onerous outcome by compromising our prevailing *conception* of justice in order to reach a decision required by a different and arguably better conception of justice.

Unmoved by explanations that rely on other political ideals, Dworkin is drawn to hypothesize the existence of a political ideal that we accept and that allows us to criticize the internal compromises characterizing checkerboard laws as instances of unprincipled state action:

> Astronomers postulated Neptune before they discovered it. They knew that only another planet, whose orbit lay beyond those already recognized, could explain the behavior of the nearer planets. Our instincts about internal compromise suggest another political ideal standing beside justice and fairness. Integrity is our Neptune. The most natural explanation of why we oppose checkerboard statutes appeals to that ideal: we say that a state that adopts these

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scheme our instincts prefer, which denies many people any influence at all over an issue they think desperately important.

Id.

65. *Id.* at 181.

> internal compromises is acting in an unprincipled way . . . .[66]

This criticism, Dworkin argues, has force for us even when these compromises deliver half a loaf of justice where otherwise there would be none, and even when no citizen or official who votes for or enforces these compromises does anything individually that violates ordinary standards of personal morality.

Integrity is the virtue hypothesized as necessary to explain our rejection of checkerboard laws. Thus, a political community that accepts integrity is closer to our practice because it will reject laws produced by internal compromise, laws that require the community to

> endorse principles to justify part of what it has done that it must reject to justify the rest. That explanation distinguishes integrity from the perverse consistency of someone who refuses to rescue some prisoners because he cannot save all. If he had saved some, selected arbitrarily, he would not have violated any principle he needs to justify other acts. But a state does act that way when it accepts a Solomonic checkerboard solution; it is inconsistency in principle among the acts of the state personified that integrity condemns.[67]

For this reason, Dworkin contends that the interpretation of law as integrity—an interpretation that places integrity alongside justice and fairness—will provide a closer *fit* with our legal practice than an interpretation that treats a community's public order as a commodity to be pared and distributed according to the relative strength of those divergent conceptions of justice prevalent within the community.

3. Does Integrity Justify Our Practice?—Dworkin argues that we can also justify our legal practice by accepting and deferring to the political virtue of integrity in our practice of law.[68] There are two major consequences of integrity that make its acceptance attractive to a political community.

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66. *Id.* at 183.

67. *Id.* at 184.

68. *Id.* at 176. In particular, Dworkin distinguishes two principles of integrity which government officials and citizens are to promote in making our practice the best it can be. The first principle is that of legislative integrity, which requires lawmakers to create or revise laws so that the total set of our laws are "morally coherent" so far as possible. The second principle is that of adjudicative integrity, which requires that the law be seen or interpreted to be coherent in principle so far as possible. *Id.*

a. The Ideal of Self-Government.—First, for the political community personified and for its members individually, integrity has a moral or expressive value that promotes the ideals of freedom and autonomous self-government extolled in the works of Kant[69] and Rousseau.[70] These ideals are promoted by integrity because rational people cannot, to the extent they are rational, commit themselves to moral rules that are inconsistent in principle. By analogy, a community personified cannot view itself as the author of laws that are willfully inconsistent in principle yet devised for the purpose of governing itself.

In support of this claim, Dworkin argues that if we understood the laws of society only as negotiated solutions to well-defined problems—merely as workable internal compromises between mutually hostile or indifferent interests—then we would distinguish sharply among relationships with our fellow citizens accordingly as the relationships were regulated by such compromises. In the absence of such political compromises, when the legal rules are silent, no shared political ideals or standards would be recognized as making a special claim on the way citizens treat one another. Thus, without the political ideal of integrity, citizens would not be required to acknowledge collectively that principles of a shared public conception of justice underlie the explicit political decisions of the community and have the force of moral demands on them. But to the extent that a community adopts the political ideal of integrity, then its citizens treat the political demands placed on them on the model of moral demands that individuals recognize as binding on themselves: an individual's desire for freedom and moral autonomy—that is, the capacity for rational but altruistic self-government—requires the reconciliation of conflicting private moral principles and convictions.

Because individual moral autonomy is thus promoted by this reconciliation (or equilibrium) of conflicting moral principles and judgments,[71] the political autonomy of a community—that is, its ca-

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69. *See* I. KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (H. J. Paton trans. 1978) (1785).

70. *See* J. ROUSSEAU, *supra* note 2.

71. Rawls uses the term "reflective equilibrium" to refer to the rational process of the mutual adjustment of our moral principles and our considered moral judgments. This ongoing dialectical process involves, alternatively, revising or qualifying our general moral principles (to avoid some otherwise unacceptable particular moral judgments they would entail) and withdrawing those of our untutored and more peripheral moral judgments that we regard with less conviction (in order to bring our judgments collectively into greater conformity with principle). This back-and-forth process results in

pacity for *collective self-government*, as distinguished from the ability of factions within the society to reach unprincipled compromises of convenience—is similarly promoted when its citizens develop a coherent public conception of justice. Thus, the ideal of self-government is directly promoted by the political virtue of integrity insofar as it motivates the development and application of shared rather than compromised standards of public law within the community. Hence, commitment to integrity fuses citizens' moral and political lives by requiring citizens with conflicting interests to resolve their conflicts by appealing exclusively to those principles of law recognized by the political community. Integrity does not permit citizens of a community to trade off their special interests, one against the other, merely in order to neutralize conflict. Rather, it is a positive political ideal: it demands that the members of a community treat each other equally by subordinating their special or factional interests to the interests and concerns they share by virtue of their membership in the same community.[72]

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cognitive equilibrium to the extent that it minimizes or eliminates conflicts between particular moral intuitions and the formal moral theory that systemizes those intuitions. And this process is reflective insofar as it reveals those principles to which our judgments conform and the premises of their derivation. *See* J. RAWLS, *supra* note 54, at 20-21. Dworkin borrows the term from Rawls to express the aim of the constructive interpretation of a social practice (or body of law) as the achievement of equilibrium between the justification of the practice and its post-interpretive requirements. LAW'S EMPIRE, *supra* note 6, at 424 n.17.

72. LAW'S EMPIRE, *supra* note 6, at 189-90. Alisdair MacIntyre offers a less optimistic picture of law's capacity to give form and expression to a public morality:

> Liberal writers such as Ronald Dworkin invite us to see the Supreme Court's function as that of invoking a set of consistent principles . . . of moral import, in the light of which particular laws and . . . decisions are to be evaluated . . . . But . . . one function of the Supreme Court must be to keep the peace between rival social groups adhering to . . . incompatible principles of justice by displaying a fairness which consists in even-handedness in its adjudications. So the Supreme Court in *Bakke* both forbade precise ethnic quotas for admission to colleges and universities, but allowed discrimination in favour of previously deprived minority groups. [Attempts to construct] a set of consistent principles behind such a decision . . . miss the point. The [Court] . . . played the role of a . . . truce-keeping body by negotiating its way through an impasse of conflict, not by invoking our shared moral first principles. For our society as a whole has none.
>
> What this brings out is that *modern politics cannot be a matter of genuine moral consensus* . . . . *Modern politics is civil war carried on by other means*, and *Bakke* was an engagement whose antecedents were at Gettysburg and Shiloh. The truth on this matter was set out by Adam Ferguson: "We are not to expect that the laws . . . are to be framed as so many lessons of morality . . . . Laws . . . are expedients of policy to adjust the pretensions of parties and to secure the peace of society . . . ." The nature of any society therefore is not to be deciphered

b. Fraternal Duties and Political Legitimacy.—Second, integrity has a practical consequence that justifies our legal practice. It legitimizes state coercion that advances those moral and political principles that inhere in and flow from the community's past political decisions—even though this coercion may be exercised pursuant to a controversial political decision that not only offends the conception of justice of those coerced but that of a majority as well. This justification for political coercion presupposes the existence of political obligations owed by citizens to other members of the community and to the community itself by virtue of their citizenship. Dworkin is careful to add, however:

> These two issues—whether the state is morally legitimate, in the sense that it is justified in using force against its citizens, and whether the state's decisions impose genuine obligations on them—are not identical. No state should enforce all of a citizen's obligations. But though obligation is not a sufficient condition for coercion, it is close to a necessary one . . . [because] no general policy of upholding the law with steel could be justified if the law were not, in general, a source of genuine obligations.[73]

What is the *source* of a citizen's political obligations, obligations necessary to legitimize coercion? Dworkin quickly dismisses theories that appeal to tacit consent,[74] the duty to be just,[75] or the duty

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from its laws alone, but from those understood as an index of its conflicts. *What our laws show is the extent and degree to which conflict has to be suppressed.*

A. MACINTYRE, AFTER VIRTUE 235-36 (1981) (quoting A. FERGUSON, 2 PRINCIPLES OF MORAL AND POLITICAL SCIENCE 145 (1792) (emphasis added)).

73. LAW'S EMPIRE, *supra* note 6, at 191.

74. *Id.* at 192. Dworkin's views on this theory recall his earlier criticism of Rawls' hypothetical social contract. Dworkin argues that the legitimacy of political coercion within an actual community cannot depend on whether that community coincidentally adopts those principles of justice that would be agreed upon by rational, self-interested persons bound to legislate the fundamental social arrangements of their society from a position of uncertainty behind an ahistorical and impersonal "veil of ignorance." Although this idea of a hypothetical social contract may define the proper conditions for social choice that would result in substantive, morally defensible principles of justice, it cannot fairly legitimize the use of force to impose those principles on persons not party to the contract. This is because "hypothetical contracts do not supply an independent argument for the fairness of enforcing their terms. A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all." R. DWORKIN, *Justice and Rights*, in TAKING RIGHTS SERIOUSLY 151 (1977).

Dworkin is correct that theories of legitimacy grounded in the actual or tacit consent of the governed are implausible. There has never been an actual historical agreement among citizens to accept and obey the political decisions of their community. And tacit consent sufficient to bind the governed cannot be inferred unless there are genuine alternatives for those to whom it is imputed; such consent cannot be given with the

of fair play.[76] These theories reveal what are at most necessary conditions for political obligation, and thus coercive legitimacy, within a particular, existing political community.

Dworkin instead develops the theory that political legitimacy is grounded in the obligations we willingly acknowledge and accept as members of a fraternal or associative political community. This idea, which relies on an extended analogy to the communal duties and obligations we accept toward family members, did not originate with Dworkin. Indeed, it is very old and appears to have been entertained first by Socrates in the *Crito*.[77] Apparently unaware of its ori-

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requisite degree of freedom when immigration is unfeasible for most citizens and would only subject them to the laws of another sovereign. LAW'S EMPIRE, *supra* note 6, at 192-93.

However, Dworkin's earlier argument against grounding political legitimacy on *hypothetical* consent is less convincing. Since liberalism fundamentally requires that a social order be one that can be *justified* to the people who live within it, then it must be possible to *understand* the legitimate enforcement of that order as being conditioned on the consent of those individuals. Thus, a necessary test, at least for the political legitimacy of a social order, "is not whether the individuals who live in it have agreed to its terms, but whether its terms *can be represented* as the object of an agreement between them." Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 142 (1987).

75. LAW'S EMPIRE, *supra* note 6, at 193.

76. *Id.* at 193-95. Dworkin argues that the fact someone

> has actually received what is due him according to the standards of justice and fairness [that accrue as benefits of a particular social organization] . . . states at least a condition necessary to legitimacy. If a community does not aim to treat someone as an equal, even according to its own lights, then its claim to his political obligation is fatally compromised. But it remains unclear how the negative fact that society has not discriminated against someone . . . according to its own standards, could supply any positive reason why he should accept its laws as obligations.

Id. at 195.

77. In the *Crito*, at 50d to 51c, Socrates, speaking for the laws, queries:

> [C]ome now, what charge do you bring against us and the state, that you are trying to destroy us? Did we not give you life in the first place? Was it not through us that your father married your mother and begot you? Tell us, have you any complaint against those of us laws that deal with marriage . . . [or] with children's upbringing and [cultural and physical] education such as you had yourself? . . . Very good. Then . . . *can you deny . . . that you were our child and servant*, both you and your ancestors? And if this is so, do you imagine that what is right for us is equally right for you, and that whatever we try to do to you, you are justified in retaliating? . . . Do you expect to have such license against your country and its laws . . . ? . . . [I]n the law courts and everywhere else you must do whatever your city and your country command, or else persuade them in accordance with universal justice, but *violence is a sin . . . against your parents, and it is a far greater sin against your country.*

PLATO, *Crito*, in THE COLLECTED DIALOGUES OF PLATO 35-36 (E. Hamilton & H. Cairn eds. 1961) (emphasis added). For critical discussions of Socrates' theory, see R. KRAUT, SOCRATES AND THE STATE (1984); Woozley, *Socrates on Disobeying the Law*, in THE PHILOSOPHY OF SOCRATES: A COLLECTION OF CRITICAL ESSAYS 299 (G. Vlastos ed. 1971). For a

gins, Dworkin nevertheless admirably elaborates this idea, showing how the fraternal duty metaphor for political obligation can be given expression in an explicit and detailed analogy between the familial duties of family members and the legal obligations that citizens owe one another and the political community generally. The outline of Dworkin's labyrinthine argument is as follows.

First, the legitimacy of state coercion must be shown to be grounded in genuine political obligations to other citizens to obey the law. Such obligations are justified by showing the legitimacy of the kind of community in which they exist.

Second, these obligations exist in associative or fraternal communities, of which the family is a paradigm. Such communities have four defining features: (1) their members regard group obligations as *special* obligations among members of the group only, and not as duties owed to other persons generally; (2) they regard these duties as *personal* in that they are owed directly from each member to each other member of the group, rather than to the group collectively; (3) each member regards his or her particular duties as flowing from a general responsibility each has of *concern* for the well-being of others in the group; and (4) the group's practices show an *equal* concern for all its members, so that even hierarchies within the group are egalitarian in that, unlike a caste system, they do not treat some members as inherently less worthy of concern.[78] There are, moreover, three models of community. These are communities of circumstance; rulebook communities that trade checkerboard laws for a coherent conception of the public order; and communities of principle that are committed to integrity.[79]

Third, only communities of principle can be true associative or

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theory that views political obligations among citizens as a special class of the shared, associational duties of friendship, see ARISTOTLE, *Nichomachean Ethics (Books VIII and IX)*, in THE BASIC WORKS OF ARISTOTLE (R. McKeon ed. 1941). Socrates and Aristotle, like Dworkin, are intent on understanding, and thereby justifying, political obligation as a species of the more familiar interpersonal associative duties that we already recognize as making valid claims on our obedience, loyalty, and concern.

The Socratic account of political obligation is modeled on the filial duties of obedience that children owe their parents, rather than the fraternal duties of mutual concern that arise between siblings. But too much can be made of this distinction; both duties are species of a more general familial associative duty that we view with relatively less suspicion than political obligations generally. Moreover, Dworkin's "fraternal duty" is a term of art: fraternal duties must meet four special criteria, and Dworkin uses the term broadly to characterize not only the duties of siblings but also the duties that children owe their parents. *See* LAW'S EMPIRE, *supra* note 6, at 203-05.

78. LAW'S EMPIRE, *supra* note 6, at 195-202.

79. *Id.* at 208-15.

fraternal communities, because only communities of principle exhibit the pervasive egalitarian reciprocity that characterizes the four conditions defining fraternal communities. They do this by eschewing checkerboard laws and treating their members in a principled fashion. Thus, every community of principle accepts the political virtue of integrity.

Fourth, we accept without further justification that in fraternal communities, such as the family or a professional association, members recognize and have genuine obligations and duties to one another even though their membership in those communities may be involuntary.[80]

Fifth, a political community that eschews the internal compromise of checkerboard laws and is instead a community of principle will be a true associative or fraternal community. Its members will therefore have genuine political duties and obligations, expressed in law, to one another and thus to the community. The existence of these political obligations in turn justifies or legitimizes that community's exercise of political coercion pursuant to their enforcement. Thus, in a community of principle—one that accepts integrity—political coercion is legitimized because that community is fraternal, and hence yields obligations its members recognize as legitimate.

Finally, our political community accepts integrity as a virtue because it eschews checkerboard laws in favor of a principled, egalitarian public order. Therefore, our political community's interpretation of law as integrity legitimizes coercion exercised pursuant to political decisions that flow from those principles providing the best interpretation of past political acts.

The attraction of Dworkin's justification for political coercion pursuant to our existing scheme of law, insofar as it accepts integrity, stems from its grounding coercion on our existing, if sometimes controversial, political obligations. These in turn are a special class of those fraternal obligations that we accept as arising incidental to our roles as members of a family or, more generally, an associative community. Thus, the crucial move in the argument occurs in the fourth step, a move in which Dworkin shifts the burden of proof to his critics. Because he does not believe that the grounds for political obligation are or need be any firmer than our existing commitments to various other forms of fraternal or associative solidarity, Dworkin is content to let the legitimacy of political coercion

80. *Id.* at 207.

rest on the same *terra firma* as other kinds of fraternal or associative coercion that we accept as legitimate. He remarks that

> [one] complaint about this "solution" of the problem of legitimacy [is that] "it does not solve the problem but evades it by denying there is a problem at all." There is some justice in this complaint, but not enough to be damaging here. The new approach, it is true, relocates the problem of legitimacy and so hopes to change the character of the argument. It asks those who challenge the very possibility of political legitimacy to broaden their attack and either deny all associative obligations or show why political obligation cannot be associative.[81]

This burden is fairly placed. If his critics[82] cannot meet it, then Dworkin will have shown that the legitimacy of political coercion is practically grounded in existing obligations that we implicitly accept as members of a fraternal community.

If citizens of political communities recognize and accept their obligations to other citizens of the community, why, assuming they do not succumb to moral "weakness of will" and assuming they act in good faith, is political coercion necessary at all? How might a citizen's arguably justified civil disobedience be explained in a way that preserves the citizen's moral sincerity and character as a just person, while recognizing the general legitimacy of state coercion intended either to punish or to force compliance with the law?[83] Dworkin's argument seems to suggest that legitimate coercion ends where citizens do not recognize or feel a sense of obligation to the other members of the community to obey the law. But, by his account, communal feelings of obligation are only evidence for citizens that they accept and have political obligations. These obligations are given content and expression in terms of principles that the community accepts and that will, in turn, entail more specific commitments to the community of which the citizen may be unaware. Thus, many political obligations may exist for a member of

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81. *Id.*

82. For example, Hutchinson criticizes Dworkin's account of fraternal community on the theory that associative arrangements that are contingent on reciprocity mask oppressive power relations as traditional fraternal and filial duties. *See Indiana Dworkin*, *supra* note 15, at 653-56. The nature, scope, and legitimacy of filial duties are by no means uncontroversial. For recent discussions, see J. BLUSTEIN, PARENTS AND CHILDREN: THE ETHICS OF THE FAMILY (1982) and Sommers, *Filial Morality*, 83 J. PHIL. 439 (1986).

83. For detailed treatment of this and related issues, see J. RAWLS, *supra* note 54; R. DWORKIN, *Taking Rights Seriously* and *Civil Disobedience*, in TAKING RIGHTS SERIOUSLY 184, 206 (1977).

the community, whether or not that individual feels any corresponding sense of obligation. This is what justifies coercion in those cases in which members of the community do not sense or are unaware of a political obligation to act.

c. The Problem of Political Authority.—One problem remains for Dworkin's account of fraternal obligation and political legitimacy that does not impair the Socratic model. In the *Crito*, Socrates argued that he ought to obey the laws of his country because he owed them the same kind of filial regard that he owed to his parents.[84] Because Socrates did not distinguish the state, or the community personified, from its laws,[85] he was in effect arguing that he owed the community personified a filial duty of obedience. Thus, by Socrates' account, the filial duty to obey the law is one that we owe *directly* to the state. If this is correct, it explains fundamentally why the *state* is justified in coercing our compliance with its laws. First, there is a pre-existing duty that citizens recognize to respect and obey the law. Second, and more to the point, political coercion is exercised, in the Socratic model, *by* the person *to whom* the duty is owed—the state. Thus, the state is recognized as having the exclusive *authority* to require its citizens to comply with those duties they owe it. This is *not* the case for third parties to whom the duty is not owed, and who have no other legal interest in its enforcement. We do not recognize them as having the authority or standing to coerce compliance with duties owed exclusively to another. This analogy further explains why we take exception when others discipline our children without our authorization, and it explains why vigilantes and other private "enforcers" not authorized by the state are reproached for taking the law into their own hands—even when the same result would have obtained had the state exercised its coercive powers. This suggests that there are at least two conditions necessary to justify or legitimize political coercion: (1) the coerced citizen must have a duty to act in the way he or she is being forced to act;[86] and (2) this duty must in some sense be owed to the political entity responsible for exercising the coercion.

Dworkin's account, like Socrates', personifies the political community and treats political obligations as associative duties that are sufficient to legitimize the state's exercise of political coercion. But

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84. Woozley, *supra* note 77, at 312-13.

85. *Id.*

86. Dworkin agrees that political obligation is a necessary but insufficient condition for legitimate coercion. *See* LAW'S EMPIRE, *supra* note 6, at 191.

there is a crucial difference: the duties recognized by members of a fraternal or associative community are essentially *personal* in that they are owed directly to other *members* of the community. Because associative obligations are recognized, one important necessary condition for legitimate political coercion has been satisfied. Moreover, other members of a fraternal community, to whom a particular member owes duties, would be morally justified in singly or collectively using reasonable coercion to require that person to comply with those recognized duties. That is, the member recognizes that these other members, if anyone, would have the moral authority to use reasonable coercion. This would not amount to a vigilante's usurpation of the law unless those members of the community had previously entrusted or assigned their coercive authority to a state or political community that could legitimately exercise such coercion on their behalf.

But none of these considerations are sufficient to show that Dworkin's fraternal community is *itself* justified in exercising political coercion to force a member to comply with his or her fraternal duties. This is because those duties, insofar as they are personal, as Dworkin requires, are owed to another member of the community and *not* to the community personified itself. Thus, since Dworkin's fraternal political community lacks *authority* to use force in this way, it cannot satisfy the second condition necessary for the legitimate exercise of political coercion.[87]

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87. Sheldon Wolin's remarks on the concept of political legitimacy and its role in pluralist democracies are particularly germane. He observes:

> Legitimacy is a complex notion. Minimally, it means that one is legally *authorized* or entitled to perform some act. But in a political context legitimacy acquires an added element, a certain aura which earlier centuries sometimes called *dignitas* or *majestas*, but which in modern, more democratic times comes from the . . . belief that the authority of law is derived from the supreme authority in a human society, the sovereign body of the people . . . . In a society whose political identity is . . . importantly linked with free and popular elections, the exalted status of law is usually attributed to the fact that legislation is primarily the creation of a legislature elected by the people. An undertaking that is legitimated is one that has been established or confirmed by public authority and hence, in a political sense, has been declared "right," that is, the power that the actor or agency will exercise is beneficial to the public good . . . .
>
> Pluralism presents a problem for a theory of legitimacy because its implicit presupposition is that no such collective entity or actor as "the people" exists. Society is composed of a variety of different interest[s] and social classes. Pluralism is thus the dissolvent of the idea of the people and hence of any claim that "the people" can act or will. But if that is the case, we are the possessors of a form of politics that has no theory of legitimacy to accompany it and to clothe its results in "right."

Wolin, *The American Pluralist Conception of Politics*, in ETHICS IN HARD TIMES 217, 225-26

One apparent solution to this difficulty might provide that the state or community personified is democratically licensed by a majority of citizens or members to serve as a limited agent for those individual members whose fraternal "rights" are violated. Suppose, for instance, that a majority enacts a statute that requires and obligates a member to confer benefits on certain members comprising a minority of the community. The fraternal duty to comply with that law will be one that the member owes only to those entitled to the benefits. The majority—those not entitled to the benefits—will not have standing to enforce the law. But enforcement by the state will still be legitimate on this theory because the minority entitled to those benefits will have entrusted or assigned their enforcement authority to a community that has been democratically licensed to exercise that authority on their behalf.

But this democratic agency theory cannot explain and is actually vitiated by the central feature of our practice of recognizing political *rights*. That is, our constitutional practice requires the state to respect the fundamental individual rights of its citizens even when doing so runs contrary to the settled will and interests of the majority. Such an exercise of power must be *ultra vires* according to pure democratic theory, because the justification for the exercise of political force is rooted in the *source* of power—the will of the majority. Thus, purely democratic political force is necessarily compromised or abused if it is employed in the recognition of individual rights in a way that intentionally thwarts the will of the majority. An appeal to the political virtue of integrity or to the community's conception of justice cannot circumvent this problem because the *purpose* of democratic machinery—which follows from the theoretical justification for democratic political power—is to express faithfully the will of a *majority* and *not* the principles of a community personified.

Since the courts are state institutions that are not democratically accountable,[88] but are nonetheless charged with enforcing in-

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(A. Caplan & D. Callahan eds. 1981) (emphasis added). Wolin's article provides an excellent historical account of the development of the ideas of pluralism and tolerance within liberal democratic theory and the difficulties they pose for the contemporary legitimation of political coercion.

88. For a discussion of the considerable constitutional and practical problems associated with efforts to legitimize court actions through substantial legislative, and thus democratic, limitations on judicial review, see Reynolds, Book Review, 44 MD. L. REV. 204, 211-13 (1985) (reviewing M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS (1982)).

Throughout the above discussion of political legitimacy, democratic control is un-

dividuals' political rights, their exercise of power intentionally contrary to the will of the majority cannot be understood as action taken by an *agent* of that will. So, one cannot coherently view the courts, and hence the state, as being democratically licensed or permitted to trump the will of the majority. Therefore, the community personified is not democratically licensed to permit minorities to delegate to it their authority to enforce their rights when those rights conflict with the will of the majority.

If this is right, then democratic agency theory cannot provide the political authority that is missing from Dworkin's account and that is necessary to bridge the gap between personal fraternal political obligations and legitimate state coercion. This political gap between associative duty and the coercive authority of the community is not surprising. It results from Dworkin's failure to explain how the interpersonal duties that members of a fraternal community owe one another can entail the existence of irreducible second-order duties—that is, distinct duties to comply with their first-order, interpersonal fraternal duties—that these members owe to the community personified. Dworkin must do this if he is to provide a complete and convincing account of political legitimacy—one that *authorizes* state coercion for the antimajoritarian vindication of individual political rights. Without such an account, his theory of political rights and political legitimacy will remain "nonsense on stilts."

VI. APPLICATIONS OF LAW AS INTEGRITY

A. Common-Law Adjudication

In the remaining chapters of *Law's Empire*, Dworkin explores the implications of his interpretation of law as integrity. First, he provocatively portrays the entire common-law adjudicative tradition as an essentially interpretive enterprise[89] wherein judges, by successive interpretations of an expanding body of case law, engage in writing an historical "chain novel" of the law. To make this story of law the

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derstood in purely procedural terms as electoral accountability. That is, the exercise of pure democratic governmental decisionmaking can occur apart from prior substantive constraints on the content of the policies or outcomes produced "such as substantive equality, respect for human rights, concern for the general welfare, personal liberty or the rule of law." Barry, *Is Democracy Special?*, in PHILOSOPHY, POLITICS AND SOCIETY (FIFTH SERIES) 155, 156 (P. Laslett & J. Fishkin eds. 1979). *See also* M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 3-4 (1982); W. NELSON, ON JUSTIFYING DEMOCRACY 3 (1980).

89. LAW'S EMPIRE, *supra* note 6, at 226. Dworkin writes that

> Law as integrity is . . . more relentlessly interpretive than either conventionalism or pragmatism. These latter theories offer themselves *as* interpreta-

best it can be, later generations of authors labor to continue the story in a constructive way that minimizes inconsistency in principle with the earlier chapters, while making a positive contribution that best justifies our practice as a whole. To the extent they succeed, the chain of law can be understood as the coherent expression of an evolving conception of justice by a single author, the community personified.[90] This requires that adjudicative integrity be more flexible than the formalistic rule-bound consistency that characterizes conventionalism.[91] Yet the constraint it places on adjudication is both non-strategic and of a stronger variety than legislative integrity; legislation invites judgments of policy that the adjudication of rights, even in hard cases, does not.[92] To illustrate both the adjudicative constraints and the constructive pull of integrity in law, Dworkin develops a detailed account of how Hercules, an archetypal and omniscient judge, might labor to interpret the common law of emotional damages when presented with a hard case.[93]

Dworkin also discusses difficulties endemic to the economic analysis of accident law and to utilitarian and libertarian interpreta-

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> tions . . . . But the programs they recommend are not themselves programs *of* interpretation . . . .
>
> Law as integrity is different: it is both the product of and the inspiration for comprehensive interpretation of legal practice. The program it holds out to judges deciding hard cases is essentially, not just contingently, interpretive; law as integrity asks them to continue interpreting the same material that it claims to have successfully interpreted itself. It offers itself as continuous with—the initial part of—the more detailed interpretations it recommends.

Id. at 226-27 (emphasis in original).

90. *Id.* at 228-38.

91. *Id.* at 219-24. Dworkin argues that adjudicative integrity is more flexible than (and hence distinct from) mere consistency, because its requirements are sometimes broader and sometimes narrower than those of consistency. It is broader because an institution that is committed to expressing a single coherent scheme of justice and fairness in the right relation may for that reason depart from a narrow line of precedents in its search for a decision that better exhibits fidelity to principles that are more fundamental to the scheme as a whole. But integrity is narrower than consistency, because its domain is principle; it does not require the community to act consistently in matters of policy. So legislatures may decide to extend a benefit to a particular group that it denies to others, not because the community's conception of justice affords that group a right to the benefit, but only because extending the benefit in that way benefits the community as a whole. *Id. But see* J. RAWLS, *supra* note 54, at 152-61 (The conception of justice as fairness entails the maximin principle, which requires as a matter of justice that society institute a distributive scheme that results in a disparity of rights to goods or benefits among its members if any other less disparate distribution would reduce the total goods available for distribution so that the least well off member of the community would be left relatively worse off than he would be under the more disparate distributive scheme.).

92. LAW'S EMPIRE, *supra* note 6, at 410.

93. *Id.* at 238-50.

tions of the common law.[94] He rejects wealth maximization, arguing that interpretations of the common law appealing to this ideal fail the test of justification, if not fit, because the goal of increasing societal wealth is not the polestar of our principles of personal and political morality.[95] In its place, he develops a difficult and complex egalitarian or "equality of resources" interpretation of accident law and private responsibility.

Dworkin contends that even in hard cases, where the common law is unclear and the precedents are split, adjudicative integrity requires a judge to formulate and adopt a principle which provides the best fit with and justification for the precedents—those cases whose holdings appear, at the pre-interpretive stage, to be arguably dispositive of the issue in question. Hence, the optimal principle of law is one that best explains and best justifies most of the precedents. Those remaining cases that cannot be consistently assimilated under the principle are viewed as mistakes. Hence, common-law adjudication requires, as Lord Mansfield said, that "law . . . not consistent in particular cases; but in general principles, which run through the cases, and govern the decision of them."[96] Because adjudicative integrity aims to treat litigants in a principled way, the common law is, on Dworkin's account, self-correcting. That is, common-law adjudication draws the development of the law, over time, in the direction of greater coherence and consistency in principle. It is in this sense that "the common law . . . *works itself pure* so that if errors creep into it, upon reasons which more enlarged views and a higher state of enlightenment . . . prove to be fallacious, they may be worked out by subsequent decisions."[97]

However, in hard cases, two competing principles will fit the majority of the precedents equally well, and better than any other contenders. These principles may possibly be coextensive in their application to the precedents. That is, they may fit exactly the same precedents, differing in their result only in the case at hand. More likely, the two principles will not be coextensive but will still account

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94. *Id.* at 276-95. For a libertarian critique of Dworkin's views, see Macedo, *The Public Morality of the Rule of Law: A Critique of Ronald Dworkin*, 8 HARV. J.L. & PUB. POL'Y 79 (1985).

95. LAW'S EMPIRE, *supra* note 6, at 285-95. For an extended discussion of Dworkin's views on several hard cases, common-law adjudication, and the economic and egalitarian interpretations of tort law, see Wasserstrom, *The Empire's New Clothes*, 75 GEO. L.J. 199 (1986). For Dworkin's previous criticisms of the economic analysis of law, see R. DWORKIN, A MATTER OF PRINCIPLE 237-89 (1985).

96. Rust v. Cooper, 2 Cowp. 629, 632 (1777).

97. Shaw v. Moore, 49 N.C. 25, 27 (1856). *See* LAW'S EMPIRE, *supra* note 6, at 400.

for an equivalent number of precedents. Thus, each principle may fit some precedents that the other principle cannot account for, while failing to fit some of the precedents that the other principle requires. When this happens, the two competing principles will fit the precedents equally well. The judge must then adopt that principle which will best *justify* the precedents overall (or, at least, those precedents on which the two principles converge) from the point of view of the *community's* political morality. But this selection process in reality requires engaging the judge's *own* political convictions and relying on the judge's *own* moral judgment in completing a constructive interpretation of the common law.[98]

This requirement introduces a deep and intractable tension into Dworkin's theory of law, because that same theory also provides that there is always, even in hard cases, a single right answer to any legal dispute. Legal interpretation is properly directed to arriving at that right answer, and the past political acts of the community provide *some* external constraint on that interpretation. But this external constraint of fit is not, by itself, sufficient to *ensure* that the interpreter will arrive at the right answer. The constraint of fit narrows the field of viable principles, but it does not necessarily uniquely determine a single correct principle. So Dworkin adds the additional interpretive constraint of political justification. This constraint, however, even though "phenomenologically genuine," turns out to be entirely "internal" or "subjective," because it not only allows but *requires* different judges to reach different interpretations of the law in hard cases according to their differing political convictions.[99]

Consequently, the interpretive constraint of political justification will only uniquely determine the "correct" principle for a single judge or, perhaps, those judges who share the same interpretively relevant political convictions. Clearly, then, the additional constraint of political justification cannot bring judges with divergent political convictions any closer to an interpretive consensus than the constraint of fit already has. So, to the extent that different judges in a pluralistic society can hear the common law speaking with a single voice, each will hear it speaking in the voice of the judge's own interpretive community. Thus, because Dworkin has not demonstrated how constructive interpretation must in theory yield the right answer in hard cases, the logical and epistemological connec-

98. LAW'S EMPIRE, *supra* note 6, at 228-32.

99. *Id.* at 235.

tions, if any, between his theory of constructive interpretation, his model of common-law adjudication, and his right answer thesis remain unclear.[100]

B. Statutory Construction

Dworkin next conducts an exhaustive critique of approaches to statutory interpretation that rely on the enigmatic notion of legislative intention. The theory underlying this practice is that statutes are communicative acts between the legislature and the public. Thus, to construe a statute is to discern a speaker's meaning. This view results in numerous problems. For instance, whose intentions count, only legislators who voted for the statute (and for reasons of principle?), or those who voted against it but influenced its drafting? What determines a legislator's intention: the legislator's hopes, desires, or convictions?[101] Since a person's stated convictions can conflict or be misleading, reliable evidence of a legislator's dominant convictions will be found only in the legislator's actual political behavior. But this suggests that the speaker's meaning theory invites an intractable hermeneutic circle: in seeking to understand a statute we look to legislative intent—understood as an aggregation of the intentions of individual legislators—which directs us to determine the legislators' convictions, which in turn requires that we first understand the legislators' political acts, which include, of course, the very statute we are trying to construe.[102]

The way to avoid this circle, according to Dworkin, is to interpret the statute constructively as expressing principles and policies that show it to fit and justify the best available historical narrative of its surrounding political events—that is, the political acts of the community. This narrative must include not only those events leading to the enactment of the statute, but also its subsequent application within the context of related political events and larger or

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100. *See generally*, Bix, *Dancing in the Dark: The Philosophical Moves of Ronald Dworkin*, 23 HARV. J. LEGIS. 307, 318-19 (1986); Hoy, *Interpreting the Law*, 58 S. CAL. L. REV. 135, 174-76 (1985).

101. These are not synonymous. An excellent argument can be made that the economic or cost-benefit analysis of law commits a logical category mistake by reductively analyzing citizens' (or legislators') *convictions* about public policy (their "public preferences") in terms of their subjective *desires* (their "private preferences"). *See, e.g.*, Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393 (1981) (economics can measure the intensity with which we hold our beliefs but cannot evaluate those beliefs on their merits because pricing convictions as market externalities confuses a private individual's *wants* with what the individual, as a citizen, believes is best for the community).

102. LAW'S EMPIRE, *supra* note 6, at 334.

complimentary statutory schemes.[103] Dworkin illustrates his discussion of statutory interpretation with occasional allusions to the problems that surrounded the construction of the Endangered Species Act[104] in the controversial Snail Darter case.[105] Although his discussion is occupied largely with problems rooted in the legislative history of statutes,[106] its attractions are substantial[107] and do much to bolster Dworkin's insistence on a constructive rather than a conversational interpretation of the law.

But Dworkin's argument that the speaker's meaning theory of legislative intention necessarily entails a hermeneutic circle is less convincing. Dworkin's hermeneutic circle only arises if legislative intent is wholly reducible to the intentions of individual legislators. This reduction and the relevance of Dworkin's contention that individual legislator's intentions cannot be coherently aggregated are both premised on Dworkin's assumption that the speaker's meaning view necessarily commits its adherents to treating the intention of a statute as a theoretical construction, "a compendious statement of the discrete intentions of particular actual people, because only these can actually have conversational intentions of the sort he has in mind."[108]

But it is not immediately clear why this should be so. Dworkin allows that conversational interpretation can be addressed to a community personified,[109] and he argues at length that corporations can

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103. *Id.* at 337-54.

104. The Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884 (codified as amended at 16 U.S.C. § 1536 (1982)).

105. TVA v. Hill, 437 U.S. 153 (1978).

106. *See* LAW'S EMPIRE, *supra* note 6, at 342-50. For a general discussion of other issues in, and approaches to, statutory interpretation, see W. REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL (1980); R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES (1975); Sykes, *A Modest Proposal for a Change in Maryland's Statutes Quo*, 43 MD. L. REV. 647 (1984).

107. Thomas Grey has praised Dworkin's chapter on statutory interpretation as "perhaps the finest treatment of this subject in the legal literature." Grey, *Advice for 'Judge and Company'*, in THE NEW YORK REVIEW OF BOOKS, Mar. 12, 1987.

108. LAW'S EMPIRE, *supra* note 6, at 315. Dworkin remarks that it is

> a metaphysical mistake to take the "intention" of the legislature itself as primary so long as [we subscribe to] . . . some mental-state version of the speaker's meaning theory of legislative intent. So long as we think legislative intention is a matter of what someone has in mind and means to communicate by a vote, we must take as primary the mental states of particular people because institutions do not have minds, and then we must worry about how to consolidate individual intentions into a collective, fictitious group intention.

109. Some qualification is in order. Dworkin argues that conversational interpretation addressed to the community personified is not the appropriate method for inter-

be personified.[110] Thus, there is no apparent reason why other institutions within the community, such as a legislative body, cannot be personified as well. If this is right, then conversational interpretation can be addressed to the legislature personified, and the problem of aggregating legislators' individual intentions need not be one that dogs the speaker's meaning approach to statutory construction. This nonreductive version of the speaker's meaning theory is often implicit in the reasoning of judicial opinions construing statutes,[111] and it takes the individual remarks in the legislative record (prior to enactment) only as evidence of the irreducible intent of a personified legislature that has found partial expression in the statute it-

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preting the independent purpose or point of a social practice that has been adopted by that community since

> if we assume that the community is a distinct person with opinions and convictions of its own . . . that assumption only adds to the story a further person whose opinions an interpreter must judge and contest, not simply discover and report. He must still distinguish . . . between the opinion the group consciousness has about what [the practice] requires, which he thinks he can discover by reflecting on its distinct motives and purposes, and what he, the interpreter, thinks [the practice] really requires.

Id. at 65.

Thus, while conversational interpretation is by Dworkin's account inappropriately directed to social practices, Dworkin allows that conversational interpretation may be addressed to the community personified to determine its opinions, convictions, and, presumably, its intentions.

110. *Id.* at 168-75.

111. *See, e.g.*, Union Elec. Co. v. EPA, 427 U.S. 246 (1976). In *Union Electric*, the Supreme Court considered whether the technology-forcing three-year mandate of the Clean Air Act § 110, 42 U.S.C. § 1857c-5 (now codified at 42 U.S.C. § 7410 (1982)) was intended to take into account economic or technological infeasibility. In construing this section of the statute, Justice Marshall, writing for the majority, examined some brief remarks in the *Congressional Record* made by Senator Muskie, manager of the Senate bill, and some Senate Committee discussions, and concluded therefrom that Congress intended to foreclose industry claims of economic or technological infeasibility. *Id.* at 258-59. It would be folly indeed to suppose that the Court's quest for congressional intent required it *first* to draw an incredibly weak inductive inference from the conversationally interpreted intentions of Senator Muskie (and a few committee members) to the individual intentions of all the remaining members of Congress and *then* to aggregate the individual intentions of all of the members of Congress into a compendious statement of the congressional intent of the statute. Instead, the more plausible hypothesis concerning judicial reasoning about legislative intent provides that courts, in cases such as *Union Electric*, treat individual legislator's statements in the record merely as one important type of evidence which supports in varying degrees different direct inferences to a primary and irreducible intention of the legislature in enacting a statute. Although it raises practical problems concerning the proper weight to be accorded the evidence in drawing such inferences, this version of the speaker's meaning view avoids the aggregative problem—and the resulting hermeneutic circle—that Dworkin attributes to all statutory construction that relies on an appeal to the notion of legislative intent.

self.[112] Dworkin cannot dismiss this personified speaker's meaning approach to the conversational interpretation of statutes by subsuming it under one of the alternatives he considers—a two-step approach that combines intentions of individual legislators versus a one-step approach that constructively interprets the convictions of the legislature itself so as best to justify what it has done[113]—because he sharply distinguishes conversational interpretation from constructive interpretation.

The distinction between conversational and constructive interpretation does not require that a complete and adequate account of statutory construction employ exclusively one interpretive approach or the other. Dworkin seems, nevertheless, to suppose that, because the two approaches are exhaustive alternatives for a single interpretive act, they would be incommensurate components of a single coherent theory of interpretation. This explains, perhaps, why Dworkin dispenses with the language of legislative intent—an interpretive discourse widely recognized as an essential pre-interpretive datum of our legal practice of construing statutes[114]—as symptomatic of a misguided effort to interpret and understand the legislative purpose of a statute.[115]

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112. The notion of a personified legislature finds expression in John Chipman Gray's observation that

> the difficulties of . . . interpretation arise when the Legislature has had no meaning at all; when the question . . . on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind . . . .

J. GRAY, THE NATURE AND SOURCES OF THE LAW 173 (1921).

113. LAW'S EMPIRE, *supra* note 6, at 336.

114. *See id.* at 18-23 (discussing the views of Judge Earl and Justices Burger and Powell on the proper role of legislative intention in the construction and application of statutes).

115. Dworkin states that our legal practice treats statements of legislative purpose made on the floor by individual legislators or in the reports of committees as especially important in construing a statute and that our courts in reading a statute attach considerable weight to these privileged statements because they are themselves acts of the state personified. *Id.* at 342-45. This description of the legislature's activities implicitly suggests that statements in the formal legislative history are properly characterized as evidence only of the purpose of a statute and not of a legislative intention of how the statute should be applied in the case at hand. Once this description is accepted as exhausting the interpretive relevance of the legislative history, the search for legislative intention is viewed as an ill-conceived attempt to understand the purpose of a statute. It is upon this procrustean bed that Dworkin lays his exclusively constructive approach to statutory interpretation. For a discussion of the distinction between legislative purpose and intent, see W. REYNOLDS, *supra* note 106, at 210-15 ("intent" refers to a solution contemplated with respect to a specific application of the statute; "purpose" refers to general policies and legislative objectives that transcend a particular application).

The possibility that the conversational interpretation of legislative intent may survive critical scrutiny does not, however, preclude a necessary role for the constructive interpretation of statutes. Nor does it require the interpretive community to subscribe, as Dworkin supposes, to the notion of a canonical moment in which a statute is enacted and imbued with all the meaning it can ever have.[116] Dworkin correctly contends that textual integrity in the construction of statutes is sensitive to the passage of time. The constructive interpretation of a statute places that statute in a temporal political context and aims to provide the best fit and justification for that statute relative to subsequent legislation and decisions that other courts have made construing that statute.[117] Thus, textual integrity does not require the judicial amendment of out-of-date statutes but results, instead, in the gradual interpretive accretion of meaning to statutes over time. The fact, however, that courts have less reason to rely on statements in the legislative history as a statute ages serves to underscore the importance of those statements to the interpretation of the legislative intention for younger statutes.

C. Constitutional Law

In discussing the Constitution,[118] Dworkin again begins with a lesson on how not to interpret the law. First, Dworkin argues that various categorical dichotomies currently prevailing in the practice and academic theory of constitutional law—such as conservatism vs. liberalism and interpretivism vs. non-interpretivism—are oversimplified or misleading and illusory.[119] Two approaches in particular are singled out for detailed scrutiny: historicism and passivism.

Historicism is the view that acceptable interpretations of the Constitution must yield principles that express the historical or original intentions of the framers. The problem with this view is that it decides nothing because the framers had several political convictions pertinent to an issue such as racial discrimination that were

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116. LAW'S EMPIRE, *supra* note 6, at 348.

117. *Id.* at 349-50.

118. For an earlier account of Dworkin's views on interpreting the common law, statutes, and the Constitution, see R. DWORKIN, *Hard Cases* and *Constitutional Cases*, in TAKING RIGHTS SERIOUSLY 81, 131 (1977).

119. LAW'S EMPIRE, *supra* note 6, at 357-60, 363. For a defense of interpretivism, or the view that non-interpretive review is illegitimate, see Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Criticism of Bork's view and a defense of non-interpretive review—or constitutional review that accommodates values outside those constitutionalized by the framers, provided they do not conflict with the Constitution—is found in M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS (1982).

abstract or concrete to varying degrees. Dworkin argues that the framers' dominant conviction was abstract—that the Constitution required that all citizens be afforded the equal protection of the laws. Their more concrete conviction may have been that racial segregation was consistent with equal protection. But determining whether these convictions conflict[120] or not itself depends on the best interpretation that we can give of the abstract conviction. While Dworkin acknowledges that our concern for certainty or stability in the law may sometimes incline us to favor more concrete intentions, he argues that this concern carries less weight in constitutional law than in other areas.[121] This is because integrity favors interpretations of our fundamental political rights that express a principled and coherent conception of justice, and "principles cannot be seen as stopping where some historical statesman's time, imagination, and interest stopped."[122] Thus, historicism does not take rights seriously in the way the Constitution requires.

Passivism is the view that democratic theory requires judges to defer to the legislatures because, as representatives of the people, legislators should decide what the Constitution guarantees and requires. This approach appeals to the political virtue of fairness by arguing that an interpretation of the Constitution will be fairer, and thus better, if it reflects political values and convictions that find broad popular support in the community rather than convictions that are alien to the community.[123] Passivism, moreover, assumes that legislatures will, over the long run, develop a more coherent conception of justice and minority rights than courts can by interpreting abstract constitutional provisions. But this faith is misplaced; it is unlikely that legislators will codify a scheme of minority rights, no matter how principled, that is deeply unpopular with their constituents.[124] Thus, passivism's concern for fairness—a political virtue properly dominant in decisions of policy—slights integrity's demand that fundamental individual constitutional rights flow in a principled way from a coherent conception of justice.

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120. A good argument can be made that the framers themselves did not believe that anything could violate the fourteenth amendment except what they believed would violate it. This suggests that the framers believed they were not infallible and that some of their more concrete convictions could conflict erroneously with their more abstract convictions. *See* Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

121. LAW'S EMPIRE, *supra* note 6, at 367.

122. *Id.* at 368-69.

123. *Id.* at 374.

124. *Id.* at 376.

The overall goal of constitutional law is to provide interpretations of the Constitution that are foundational in that they "fit and justify the most basic arrangements of political power in the community."[125] Dworkin provides an example of such an interpretation by considering three theories of racial equality that respectively employ the ideas of suspect classifications, banned categories and banned sources. The *suspect classifications* theory treats a person's right against discrimination merely as a consequence of a more general right to be treated as an equal according to the conception of equality prevalent in the state. Race and other suspect classifications are special on this account only because history suggests that members of these groups are likely to be denied the equal concern and respect afforded others on a rational basis. Thus, there is no distinct right to be protected from discrimination beyond what the "rationality" standard requires. The *banned categories* theory insists that the Constitution recognizes a distinct right that persons have against discrimination as a trump over the state's conception of the general welfare. This right precludes distinguishing groups of citizens for different treatment on the basis of certain categories, such as race, ethnic background, or gender, even when the intended differential treatment would benefit members of those groups or would advance an otherwise permissible conception of the general interest. The *banned sources* theory recognizes a special right against discrimination or differential treatment when it results from certain collective preferences or choices. When these collective preferences are rooted in some form of prejudice against a particular group, they can never be counted in favor of adopting or retaining policies that promote or permit the disadvantage of that group. The interpretation preferred by integrity will flow from that conception of equality which provides the best overall fit and justification of *Brown v. Board of Education*[126] and *Regents of the University of California v. Bakke*.[127]

Dworkin concludes that the banned sources theory meets this

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125. *Id.* at 380. Dworkin adds that this foundational justification of the most basic arrangements of political power

> must be a justification drawn from the most philosophical reaches of political theory. Lawyers are always philosophers, because jurisprudence is part of any lawyer's account of what the law is, even when the jurisprudence is undistinguished and mechanical. In constitutional theory philosophy is closer to the surface of the argument and, if the theory is good, explicit in it.

Id.

126. 347 U.S. 483 (1954).

127. 438 U.S. 265 (1978).

interpretive test. Both the banned categories theory and the banned sources theory sufficiently rule out ordinary racial discrimination.[128] But there is a crucial difference: the banned categories theory precludes differential treatment based on the category of race,[129] while the banned sources theory precludes differential treatment that results from reasons or preferences rooted in racial prejudice.[130] The banned categories theory, it turns out, is color-blind to a fault. It results in an interpretation of the equal protection clause that fails to fit all of the precedents, notably *Bakke*,[131] and fails to justify remedial programs that eradicate the effects of racial prejudice. So the banned catagories interpretation would hold reverse discrimination to be unconstitutional. The banned sources interpretation, on the other hand, fits *Brown* and *Bakke* equally well[132] and justifies them both by appealing to the principle that ordinary discrimination is unconstitutional, not because it results in differential treatment, but because it results from unjust preferences. Many statutes that treat people differently due to properties beyond their control are constitutional. Thus, the injustice of discrimination is explained only by the banned sources theory of equality.[133]

Although Dworkin's treatment of equal protection law is attractive, his account of constitutional law generally is incomplete and does little to suggest the outlines of a comprehensive theoretical approach to interpreting the Constitution. Instead, Dworkin is content merely to observe that his hypothetical Justice Hercules escapes the standard academic classifications of Justices, and his intervention in the process of government to declare some act of government unconstitutional is done solely in the service of his conscientious political judgment about "what democracy really is and what the Constitution . . . really means."[134] While this piecemeal approach is to be commended, perhaps, to Justices of lesser ability, it does not seem too much to ask Hercules for a positive account of how integrity would construct theoretical and interpretive connections between equal protection doctrine and other areas of constitutional jurisprudence concerned with principles of federalism, privacy, and due process.

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128. LAW'S EMPIRE, *supra* note 6, at 388.
129. *Id.* at 383-84.
130. *Id.* at 384-87.
131. *Id.* at 394.
132. *Id.*
133. *Id.* at 395.
134. *Id.* at 397-99.

VII. THE CONFLICT OF INTEGRITY AND JUSTICE

Finally, Dworkin considers the problem of perspective. Dworkin contends that a fully adequate interpretation of our law must provide a vision of law that is broad enough to encompass law's past, its institutions, and its ideals; it must ultimately provide a vision of our community and our statecraft that combines practical politics with utopian political theory. But Dworkin's elaboration of this vision raises more questions than it settles, and it suggests some fundamental tensions in his interpretation of law that the reader may sense at various points throughout the book.

For instance, Dworkin remarks in an earlier discussion that conflicts may arise between the integrity and justice of an institution that are so intractable that the best interpretation of the practice must still show it to be pervasively unjust. When this occurs, we must abandon the practice and "deny that [it] can impose genuine obligations at all. . . . [T]he obligations it purports to impose are wholly cancelled by competing moral principle."[135] Thus, integrity is necessary but not sufficient to justify coercive political decisions.

Nevertheless, there is an ambiguity in this formulation because it implicitly appeals to two concepts of justification that are trying to do the work of one. It is rather the case that integrity is *legally* necessary but not legally sufficient—because it is not *morally* and *politically* sufficient—to justify coercion. Alternatively, a political decision pursuant to a given system of law may itself be legally justified in the minimal sense that the decision formally fits or comports with the existing *grounds* of law in that system. But that decision may not be legally sufficient to support or justify political coercion because it may fail to have the *force* of law—that is, it may not be morally or politically justified by the most basic principles that flow from the interpretive community's conception of justice.

It may be that in a particularly corrupt legal system, these two forms of justification will not converge for a particular decision. This is possible because integrity is not necessarily sovereign over the virtues of justice and fairness, though it is sovereign over the grounds of law.[136] Thus, a judge charged with administering Nazi law would have no legal grounds for freeing Jews, but would, under Dworkin's interpretation, have moral or political reasons that would justify and require doing so.

This suggests, first, that Dworkin's view of law is in one respect

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135. *Id.* at 203.
136. *Id.* at 217-18.

not so remote from Hart's. Both views allow that the *grounds* of law may exist and operate independently of any moral principles that we could recognize as justifying that law. Second, such grounds of law cannot for us have the *force* of law because our interpretation of them cannot provide a moral or political justification of state coercion flowing from those grounds. What will have the force of law for us, in such circumstances, is the demand that we sacrifice integrity, and thus the grounds of law, to the political principles of justice and fairness that prevail in our interpretive community. Thus, there is room in Dworkin's view for a sense in which civil disobedience can be legally as well as morally *required*.

But Dworkin does not wish to part lightly with integrity, because it politically bonds a pluralistic community by requiring it to develop its law in an historically principled way, rather than by compromising those aspects of the community's conception of justice that still remain controversial and unsettled. So Dworkin argues, first, that a judge who accepts law as integrity must have convictions about fit that are minimally checked by the community's actual political history.[137] Fit must be independent of convictions about the kinds of justification that show the practice in its best light, if fit is to constrain the justification available for a practice.[138] Later, however, he seems to render this requirement vacuous by arguing that a judge's convictions about fit are always political and not mechanical, because all of the dimensions of interpretation are in the final analysis responsive to the judge's political judgment.[139]

These submerged tensions—some would say contradictions—in Dworkin's interpretation of law as integrity work themselves to the surface in the final pages of the book. To understand why law as integrity "not only permits but fosters different forms of substantive conflict or tension within the overall best interpretation of law"[140] it is necessary to distinguish inclusive integrity from pure integrity.

Inclusive integrity requires that judges interpret the present law of the community to express, so far as possible, coherent principles of political fairness, substantive justice, and procedural due process

137. *Id.* at 255.

138. *Id.* at 67-68.

139. *Id.* at 257. Dworkin writes that "[t]he constraint fit imposes on substance . . . is . . . the constraint of one type of political conviction on another . . . . It is not the constraint of external hard fact or of interpersonal consensus." *Id.* The above passage and others, *id.* at 67-68, suggest difficulties in Dworkin's account of law as interpretation, understood as a philosophical theory about the nature of law. *See* Levenbook, *The Sustained Dworkin*, 53 U. CHI. L. REV. 1108 (1986).

140. LAW'S EMPIRE, *supra* note 6, at 404.

combined in the right relation.[141] This adjudicative interpretation must account for all the political virtues, and this will inevitably require that some decisions pull against and so fall short of a completely coherent expression of substantive justice. Our concrete, actual law is thus fixed by an inclusive integrity that requires judges to declare and enforce the present law.[142] Dworkin believes, however, that such decisions usually will, as a practical matter, exhibit our community's substantive conception of justice well enough to justify political coercion.

Nevertheless, integrity alone cannot guarantee that a decision can justify political coercion. And where it does, the horizontal systemic constraints of inclusive integrity insure that the decision's conception of justice is or will soon be surpassed by purer conceptions of justice that develop and gain acceptance within the political community. This explains, perhaps, why many political philosophers have tended to neglect the ideal of integrity. Their gaze has been fixed, instead, on a brighter beacon that can enlighten, as well as justify, the exercise of power, namely justice.[143]

Dworkin sees this light, but only through the lens of integrity: "We bow to justice, among the political virtues, by creating for it a special form of integrity."[144] This is *pure* integrity. Its purpose is to avert the community's sidelong glance from its historic, institutional duties and constraints so that it may focus on reforms that serve more comprehensively its vision of social justice.[145] But our community is pluralistic. Although we are united in our commitment to

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141. *Id.* at 405.

142. *Id.* at 406.

143. Rawls observes that

> in times of social doubt and loss of faith in long established values, there is a tendency to fall back on the virtues of integrity: truthfulness and sincerity, lucidity and commitment . . . . If no one knows what is true, at least we can make our beliefs our own . . . . If the traditional moral rules are no longer relevant and we cannot agree which ones should take their place, we can in any event decide with a clear head how we mean to act . . . . Now of course the virtues of integrity are virtues, and among them the excellences of free persons. *Yet while necessary, they are not sufficient; for their definition allows for most any content:* a tyrant might display these attributes to a high degree . . . . It is impossible to construct a moral view from these virtues alone; being virtues of form they are in a sense secondary. But *joined to the appropriate conception of justice . . . they come into their own.*

J. RAWLS, *supra* note 54, at 519-20 (emphasis added). For other recent discussions of justice, see M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

144. LAW'S EMPIRE, *supra* note 6, at 406.

145. *Id.* at 406-07.

integrity and to certain shared principles of justice, our divergent, competitive visions of justice pull us in different directions.

Thus, Dworkin's lens of integrity is bifocal; it splits our image of justice and the political community's image of itself. For this reason, his interpretation of law as integrity is in the end mysterious and puzzling. Integrity is the great unifying political virtue of our pluralistic community. Yet his interpretation of integrity is not itself unitary because it does not provide a ruling conception of integrity that is sovereign over both inclusive and pure integrity. How do our community's competing, utopian dreams of law prevail upon or from within our fixed, present law without compromising either inclusive integrity or pure integrity? Thomas Grey posed the question well: "How is the metaphoric commonwealth, . . . with its independent and public spirited citizenry, to coexist in integrity with . . . the legal and judicial empire of princes, prophets, and superhuman heroes?"[146]

VIII. CONCLUSION

Had Ronald Dworkin never written anything after *Taking Rights Seriously*, his place in twentieth century Anglo-American jurisprudence would have been secure. But with *Law's Empire*, he surpasses his excellent earlier essays and gives us a sustained and attractive theory of jurisprudence. In it Dworkin develops a wealth of powerful, detailed arguments and ideas that connect with each other and with the broad range of complex, related issues they are designed to address. The book is not without its faults. And it has its share of rhetorical flourishes, many inspired, which will annoy and distract some critics. But it is written in Dworkin's usual lively, elegant style, and with as much clarity as the subject permits.

Law's Empire makes a number of enduring, if imperfect, contributions to modern jurisprudence. Chief among these are its development of a theory of constructive interpretation, its treatment of law as an interpretive concept, its account of political obligation and legitimacy, and its argument that integrity is a politically necessary dynamic in any adequate interpretation of our law. Moreover, the book makes another less tangible, but even more important, contribution to our jurisprudence. It will attract critics from the political

146. Grey, *supra* note 107. The images allude to Dworkin's statement that "[t]he courts are the capitals of law's empire, and judges are its princes, but not its seers and prophets. It falls to philosophers, if they are willing, to work out law's ambitions for itself, the purer form of law within and beyond the law we have." LAW'S EMPIRE, *supra* note 6, at 407.

right and left of the legal community for years to come. Because of this critical convergence, *Law's Empire* is destined to ensure a central role for liberal political theory in shaping and influencing the course of contemporary jurisprudence into the next century.

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